89-290

No.

IN THE

Supreme Court of the United States

October Term, 1989

FRANCES JONES, BEVERLY HARDER, ELEANOR MURRAY, LINDA NICKEL, and MARY RUANE

Petitioners,

vs.

TRUCK DRIVERS LOCAL UNION NO. 299

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED*

A. Whether The Decision Below Conflicts With *Lingle V. Norge Div. of Magic Chef, Inc.*, _____ U.S. _____, 108 S.Ct. 1877 (1988), By Preempting A State Claim Which Is Merely Parallel To, But Not Identical To, A Contractual Claim.

B. Whether Preemption Of A State Antidiscrimination Statute Conflicts With The Federal Policy Encouraging Cooperative Federalism For Correction Of Employment Discrimination.

C. Whether A State Claim Can Be Preempted Where The Federal Issue Arises Only In The Defense And Not The Claim Itself.

D. Whether A Seniority System Which (1) Allows Men But Not Women To Temporarily Transfer At Higher Pay, (2) Irrationally Places The Clerical Women In One Unit, (3) Had Its Genesis in Sex Discrimination, And (4) Is Maintained With An Illegal Purpose Is Bona Fide Under The Four-Factor Test Adopted By Other Circuits.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Frances Jones, Beverly Harder, Eleanor Murray, Linda Nickel, and Mary Ruane petition the Court to issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The first decision of the district court is reported as *Jones et al. v. Cassens Transport, et al.*, 538 F. Supp. 929 (E.D. Mich, 1982). The court ordered $365,334.23 in damages against both defendants. The first decision of the court of appeals dismissing appeals is published without opinion at 705 F.2d 454. The second decision of the court of appeals reman-

ding the case to the district court is reported as *Jones et al. v. Truck Drivers Local Union No. 299,* 748 F.2d 1083 (6th Cir. 1984).

The second or 1985 decision of the district court is reported at 617 F. Supp. 869 and is reprinted as Appendix A at pages 1a to 48a of the appendix to this petition (App. 1a-48a). The third decision of the court of appeals is reported at 838 F.2d 856 and is reprinted as Appendix B at App. 49a-89a.

Following the court of appeals' third decision it issued a series of procedural rulings. After timely petitions for rehearing were filed by both parties, on April 29, 1988, the court denied "the petition," seemingly referring only to petitioners' (appellees below), but not respondent's (appellant below) petition. This order is not reported and is reprinted as Appendix C at App. 90a-91a.

Petitioners then moved for a stay pending the outcome of *Lingle v. Norge Division of Magic Chef, Inc.*, _____ U.S. _____, 108 S. Ct. 1877 (1988), in this Court. After *Lingle* was decided, on July 1, 1988, the court of appeals directed the parties to submit briefs on its authority to reconsider its decision and to set out their respective positions in this case in light of *Lingle*. This order is not reported and is reprinted as Appendix D at App. 92a-93a.

On March 21, 1989, the court of appeals denied "appellant's" "petition to rehear the case." The order confused "appellant" with "appellee." This order is not reported and is reprinted as Appendix E at App. 94a-95a.

Respondent filed a motion to clarify the March 21, 1989, order. On April 17, 1989, the court acknowledged "ambiguities" in its order of April 29, 1988, stated it had believed it had already disposed of respondent's petition, and then explicitly denied respondent's petition for rehearing. This order is not reported and is reprinted as Appendix F at App. 96a-97a.

STATEMENT OF JURISDICTION

The court of appeals issued its third opinion on February 3, 1988. The court's final order denying the last petition for rehearing was issued on April 17, 1989. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

On June 6, 1989, the Supreme Court through Justice Scalia extended the time for petitioning for certiorari to August 18, 1989.

STATUTES INVOLVED

Section 301(a) of the Labor-Management Relations Act, 29 U.S.C. § 185(a) states:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Section 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a) states:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: provided . . .

Section 204 of Michigan's Elliott-Larsen act, 37 M.C.L.A. § 2204 states:

A labor organization shall not:

(a) Exclude or expel from membership, or otherwise discriminate against, a member or applicant for membership because of religion, race, color, national origin, age, sex, height, weight, or marital status.

(b) Limit, segregate, or classify membership or applicants for membership, or classify or fail or refuse to refer for employment an individual in a way which would deprive or tend to deprive that individual of an employment opportunity, or which would limit an employment opportunity, or which would adversely affect wages, hours, or employment conditions, or otherwise adversely affect the status of an employee or an applicant for employment, because of religion, race color, national origin, age, sex, height, weight, or marital status.

(c) Cause of attempt to cause an employer to violate this article.

(d) Fail to fairly and adequately represent a member in a grievance process because of religion, race, color, national origin, age, sex, height, weight, or marital status.

Section 211 of Michigan's Elliott-Larsen act, 37 M.C.L.A. § 2211 states:

Notwithstanding any other provision of this article, it shall not be an unlawful employment practice for

an employer to apply different standards of compensation, or different terms, conditions or privileges of employment pursuant to a bona fide seniority or merit system.

Section 703(h) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(h), states:

> Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d)).

Section 706(c) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(c), states:

> **State or local enforcement proceedings; notification of State or local authority; time for filing charges with Commission; commencement of proceedings.** In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) [(b)] by the person aggrieved before the expiration of sixty days after such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

Section 708 of the Civil Rights Act of 1964, 42 U.S.C. 2000e-7, states:

> Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law

> of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title.

Section 709(b) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-8(b), states:

> **Cooperation with State and local agencies.** The Commission may cooperate with State and local agencies charged with the administration of State fair employment practices laws and, with the consent of such agencies, may, for the purpose of carrying out its functions and duties under this title and within the limitation of funds appropriated specifically for such purpose, engage in and contribute to the cost of research and other projects of mutual interest undertaken by such agencies, and utilize the services of such agencies and their employees, and, notwithstanding any other provision of law, pay by advance or reimbursement such agencies and their employees for services rendered to assist the Commission in carrying out this title. In furtherance of such cooperative efforts, the Commission may enter into written agreements with such State or local agencies and such agreements may include provisions under which the Commission shall refrain from processing a charge in any cases or class of cases specified in such agreements or under which the Commission shall relieve any person or class or person in such State or locality from requirements imposed under this section. The Commission shall rescind any such agreement whenever it determines that the agreement no longer serves the interest of effective enforcement of this title.

Section 1104 of the Civil Rights Act of 1964, 42 U.S.C. 2000h-4, states:

> Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.

STATEMENT

A. Proceedings Below

The case arises out of petitioners' loss of jobs due to sex discrimination when their long-time employer, Square Deal, was merged into Cassens Transport on August 26, 1977. The complaint alleged in count I:

> 11. Defendants, jointly and severally, negotiated an agreement to allow employees of Square Deal Cartage Company to bid on jobs at Cassens in accordance with the seniority they had as employees of Square Deal Transport. That said agreement excluded Plaintiffs from such bidding rights.
>
> 12. The sole reason that Defendants excluded Plaintiffs from the benefits of the above described agreement was because they were women.

Complaint §§ 11-12.

The district court' 1985 decision relied on two alternative findings to find discrimination in petitioners' losing their jobs. First, it interpreted the collective bargaining agreement ("CBA"), and found it compelled petitioners' transfer to

Cassens; the district court believed that the fact that all Square Deal employees — drivers, yard, garage, and office — were in a single bargaining unit compelled this holding. Appendix A, App. 8a12a, 33a.

In the alternative, the district court assumed the union's interpretation of the CBA as glossed by uniform past practices were adopted, and that the office workers were in a bargaining unit separate from the other employees. Appendix A, App. 35a-36a. On this assumption, the district court found facts demonstrating both that the system was not bona fide, and that the company and union acted discriminatorily. Appendix A, App. 36a-47a.

The district court also found as fact the respondent union, Square Deal, and Cassens engaged in a pattern of sexually discriminatory conduct throughout the time period. Appendix A, App. 6a-24a.

After the district court's first decision Cassens settled with plaintiffs by paying approximately half of the judgment.

The Sixth Circuit reversed the district court's construction of the CBA that all Square Deal employees had been in a single bargaining unit, and that Square Deal seniority gave them a right to transfer to Cassens. Appendix B, App. 59a-60a. Petitioners do not seek review of that holding.

But the appeals court ignored the myriad of facts found by the district court establishing that the seniority system was not bona fide. Appendix B, App. 60a. As shown below, under the four-factor test utilized by the Fifth circuit and other circuits — and not acknowledged by the opinion — the seniority system was not bona fide.

None of the district court's factual findings as to sexual animus or action by the company and union were reversed.

Finally, the panel, with one judge dissenting, found the second portion of petitioners' claims preempted by Section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. 185. (Appendix B, App. 61a) The decision was made without the benefit of this Court's opinion in *Lingle v. Norge Div. of Magic Chef*, _____ U.S. _____, 108 S.Ct. 1877 (1988), decided a few months later. *Lingle* rejected "parallelism" of contractual and statutory issues as a basis for preempting a state statute, and recognized that Section 301 does not preempt state antidiscrimination laws.

Lingle was brought to the Sixth Circuit's attention in post-decision proceedings. The panel at first ordered the parties to brief its "authority" to reconsider. Appendix D, App. 92a-93a. The panel then held it was brought up "too late" and accordingly it had no authority to consider *Lingle*. Appendix E, F, App. 94a-97a. But it also acknowledged "ambiguities" in its rulings leading the parties to believe that a rehearing petition was still pending (and accordingly that consideration of *Lingle* might be proper). Appendix F, App. 96a-97a.

B. Facts

The plaintiffs were office clericals at Square Deal. Their unit consisted of the clerical workers who were women. Appendix A, App. 37a-38a, 41a. Square Deal also employed unionized male clerical "yard inspectors" in the yard, and a unionized male clerical "parts clerk" in the garage. App 38a-39a. All of the male and female clericals worked in Square Deal's "accounting" and "load makeup" functions. *Id.* Occasionally the female clericals did the same work or did similar work alongside of the male clericals. But the men were paid more than the women. When males were occasionally assigned clerical work in the office or the garage they were paid at their prior rates; when plaintiffs got the same assignment, they were paid their

lower office rate. Appendix A, App. 36a-39a. Male drivers would be allowed to work "extra" in the garage rather than be laid off, but women were not when they faced layoff. Appendix A, App. 42a. The women were able to perform all of the yard jobs, whether clerical or not. Appendix A, App. 44a-46a.

In 1958 respondent and Square Deal negotiated that drivers and yardmen (all male) would be on one seniority list. This meant the male yard-clericals could crossbump without loss of seniority. This combined yard/driver list was an exception to the industry practice, Appendix A, App. 8a, 39a., and the district court found as a fact that its purpose was to provide the best available job opportunities, regardless of "units," for the all-male drivers, and their male progeny. App 37a.

In June, 1976, Cassens bought Square Deal. Two months later it filed a request for determination with the Joint Arbitration Committee to establish a seniority board at Cassens arising out of the purchase. By its terms, the request and accompanying exhibits affected all employees including plaintiffs. Appendix A, App. 14a. But the women were never informed of it, did not attend the hearing (though other male Square Deal employees did), and no one spoke for them at the hearing. *Id.* The Committee's ruling in February, 1977, provided for preparation of a new Cassens yard seniority list, including seven Square Deal employees, by dovetailing master seniority lists from among the former employers. Appendix A, App. 15a.

To determine which seven employees would be chosen from Square Deal, the union decided to have a special bid restricted to former yard and driver employees only. Inclusion of office workers in the bid was not precluded by the Committee decision. Appendix A, App. 15a. No notice of this bid was ever

posted. It was held in August-September, 1977. Plaintiffs didn't learn of it until after notice of their terminations and after the merger, during the bidding period. Even though the Committee decision contemplated only seven Square Deal employees in the new Cassens yard, because of an abundance of work, four additional employees were allowed to bid. Appendix A, App. 16a, 20a, 47a.

On occasions both before and at the time the bid started, when a woman asked a union official about transferring to a higher-paying job, she was told she already had the most "pleasurable" job, she was "too emotional" about layoffs, and would be unable to survive a winter in the yard. Appendix A, App. 24a, 43a. The district court found plaintiffs had made innumerable requests over the years to both company and union officials to get out of the office, and were uniformly denied. Appendix A, App. 38a, 42a.

The company's position was expressly stated that no woman had ever worked in the yard and none ever would. Appendix A, App. 17a, 22a. But, when a union official met two of the plaintiffs just after learning they would not be retained, he falsely stated the company's reason was the computerization of its offices. Appendix A, App. 18a.

Plaintiffs' *prima facie* case was fairly summarized by concurring and dissenting Judge Merritt.

> The second group of factual findings concerns other, non-contractual evidence of discrimination. The District Court found that the union engaged in a pattern of discriminatory conduct: repeatedly refusing tonegotiate with Cassens for the plaintiffs' jobs, [617 F. Supp.] at 877-82;making misleading statement to the female members about their rights andthe zeal with which the union was protecting those rights, *id.*, at 878,882; failing to inform or consult the female

> members about the effects of the merger or seniority grievance procedures, *id.* at 877-78; and using segregated seniority lists to prevent women from competing with men for existing or new positions, *id.* at 883.

(Appendix B, App. 69a) He then quoted the district court's factual conclusions. (Appendix B, App. 69a-70a)

REASONS FOR GRANTING THE WRIT

A. The Decision Below Conflicts With *Lingle V. Norge Div. of Magic Chef, Inc.*, _____ U.S. ____, 108 S.Ct. 1877 (1988), By Preempting A State Claim Which Is Merely Parallel To, But Not Identical To, A Contractual Claim.

The panel majority summarized its holding[1] by dividing the evidence into two aspects and considering them separately:

> "In summary we construe the district court's order and judgment essentially to have found the defendant union liable for its failure to represent the plaintiffs fairly. [First,] To the extent the district court imposed this liability by reason of the union's agreement, neutral on its face, with respect to seniority recognition and bidding procedures, this ruling is precluded by virtue of Michigan law (§ 37.2211), which respects the legitimacy of seniority. [Second,] Apart from the union's right to rely in good faith on the collective bargaining agreement seniority pro-

[1]The majority's view rests solely on the view that 301 preempts the case because contract construction is involved. (Slip Opinion 14) It does not rest on a view that the independent federal duty of fair representation itself, apart from Section 301, preempts the case. Nor could it. See Slip Opinion 33-40 (Merritt concurring and dissenting).

> visions, plaintiffs' claim against the union for failure to represent fairly under the contract is preempted by federal law, which governs the interpretation of the collective bargaining agreement. The district court's finding of unfair representation based upon sex discrimination also triggers interpretation of the collective bargaining agreement's antidiscrimination clause, again a matter of federal labor law preemption." (Appendix B, App. 61)

The appeals court thus recognized that the second part of the district court's holding was simply that respondent discriminated because of sex apart from the CBA.

Lingle held that a state claim is preempted only if it requires the interpretation of a collective bargaining agreement. Lingle was fired for filing a worker's compensation claim. Illinois tort law protected such filings. The Seventh Circuit had held that because a state court would decide the same issue with the same analysis of the facts as would an arbitrator under the CBA, Lingle's case was preempted. But this Court said such "parallelism" did not make Lingle's case dependent on the contractual analysis.

The majority below, like the Seventh Circuit in *Lingle*, found the mere *existence* of an antidiscrimination clause in the CBA determinative of the preemption issue. (Appendix B, App. 57, 61) The majority also found support for its holding in the prior Sixth Circuit decision in its prior decision in *Maynard v. Revere Copper Products*, 773 F.2d 733 (6th Cir., 1985).

But the right to be free of discrimination effectuated by the company and union *entering into* an ad hoc special bid agreement is a "nonnegotiable state-law right [of] employers or employees independent of any right established by contract." *AllisChalmers Corp. v. Lueck*, 471 U.S. 202, 213 (1985). Con-

trast the facts in *Allis-Chalmers* and in *I.B.E.W. v. Hechler*, _____ US _____, 107 S. Ct. 2161 (1987) where the claims arose directly under the CBA.

This does *not* trigger preemption. *Maynard v. Revere Copper Products* is also distinguishable for the same reason, namely, that the source of the rights which petitioners assert is state law independent of the CBA.

The Sixth Circuit in at least two other cases has changed its view or been guided by the teaching of *Lingle*: *Dougherty v. Parsec Inc.*, 872 F.2d 766 (6th Cir., 1989), on remand in light of *Lingle*, _____ U.S. _____, 108 S.Ct. 2813 (1988); *Smolarek v. Chrysler Corp.*, _____ F.2d _____, 131 LRRM 3022 (6th Cir., 1989) (en banc).[2] This case is here timely, and should be afforded the same treatment.[3]

B. Preemption Of A State Antidiscrimination Statute Conflicts With The Federal Policy Encouraging Cooperative Federalism For Correction Of Employment Discrimination.

Michigan, along with all the states, has an abiding interest in prohibiting gender based employment discrimination. *Beech Grove Investment Co. v Civil Rights Commission*, 380 Mich 405, 157 NW2d 312 (1968); *Adama v. Doehler-Jarvis, Div of NL Industries*, 115 Mich. App. 320, 320 N.W.2d 298 (1982);

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[2] "We are aware that *Lingle* has now been decided on June 6, 1988, 56 U.S.L.W. 4512 (U.S. 1988), and that the decision bears upon issues heretofore decided by this court on February 3, 1988." Appendix D, *infra*, at App. ____. Because of the confusion as to what disposition the panel had made with the petitions for rehearing, it did not order reargument after *Lingle*.

[3] *Smolarek*, an *en banc* decision authored by the same judge that wrote the opinion here, found no preemption of a claim that an employer did not provide work consistent with the plaintiff's handicap and then fired him.

Hillman v. Consumers Power Co., 90 Mich. App. 627, 282 NW2d 422 (1979).

After the passage of Title VII, including its clauses encouraging and facilitating state action, 42 USC 2000e-2(h), 2000e-5(c), 2000e-7, 2000e-8(b), and 2000h-4, Congress surely *wants* the states to do everything possible to stop discrimination against women.[4]

A state's antidiscrimination law can actually modify the federal statute. As an example, it is because of the existence of Michigan's Elliott-Larsen act that civil rights claimants in Michigan have 300 days to file a federal discrimination charge against a union, rather than the 180 days which Title VII otherwise provides. *Jones v Airco Carbide Chemical Co.*, 691 F.2d 1200, 1201-04 (6th Cir., 1982); *Mohasco Corp. v Silver*, 447 U.S. 807 (1980).

Even before Congress enacted Title VII in 1964, this Court rejected Railway Labor Act preemption of state antidiscrimination legislation. *Colorado Anti-Discrimination Commission v Continental Air Lines*, 372 U.S. 714 (1963).

It might be argued that the preemption issue posed here arises from federal enactment of 301 and from federal implication of a duty of fair representation from the National Labor Relations Act, and not from Title VII. Accordingly, the argument would run, Congressional expression as to the interplay of state remedies with Title VII are irrelevant.

But the mission of the courts in fashioning the federal common law of labor relations is to accommodate the *totality* of federal labor policy. This policy must be discerned from both the labor laws and the antidiscrimination laws where they in-

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[4] *California Federal Savings and Loan Assoc. v. Guerra* ____ US ____, 107 S Ct 683, 689 (1987) (plurality opinion).

tersect. *Delta Airlines, Inc. v. Kramarsky,* 650 F.2d 1287, 1296-1302, (2nd Cir., 1981), 666 F.2d 21, 26 n. 2, (2nd Cir., 1981), vacated in part on other grounds sub nom *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 103 S.Ct. 2890 (1983). See also *Lingle, supra,* 108 S.Ct. at 1885 ("Congress has affirmatively endorsed state antidiscrimination remedies in Title VII"); *Shaw v. Delta Airlines,* 463 U.S. 85, 95 n. 13 (1983) (certiorari granted noting importance of question "whether state fair employment laws may be enforced to the extent they prohibit the same practices as Title VII"; held to that extent no preemption); *Burnett v. Grattan,* 468 U.S. 42, 52 n. 14 (1984) ("Congress, for whatever reason, sees no need for national uniformity in all aspects of civil rights cases"; six-month time limitation of *Del Costello v. IBT,* 462 U.S. 151 (1983) rejected).

Thus federal and state courts considering the preemption question as it affects state regulation of discrimination have found no preemption. *Vaughn v. Pacific Northwest Bell Co.*, 289 Or. 73, 611 P.2d 281 (1980) (301); *Franklin Mfg. Co. v. Iowa Civil Rights Commission,* 270 N.W.2d 829 (Iowa, 1978) (NLRA); *Sears v. Ryder Truck Rental,* 596 F. Supp. 1001 (E.D. Mich., 1984) (NLRA); *Bald v. RCA Alascom and Teamsters Local 959,* 569 F.2d 1328 (Alaska, 1977) (NLRA); *Maine H.R.C. v. United Paper Workers,* 383 A.2d 369 (Me, 1978) (NLRA); *Lucas v. Brown & Root, Inc.*, 736 F.2d 1202 (8th Cir., 1984) (Title VII).

The effect of the panels's opinion on Michigan's ability to enforce the ElliottLarsen Act will be enormous. Any case involving a union with a contract in effect would appear to be preempted. The right to jury trial, *Schafke v. Chrysler Corp.*, 147 Mich. App. 769, 376 N.W.2d 406 (1985), will be jeopardized. Michigan's ability to award compensatory damages, *Slayton v. Michigan Host, Inc.*, 144 Mich. App. 535, 558, 376 N.W.2d 664 (1985), and exemplary damages, *Ledsinger v. Burmeister,* 114 Mich. App. 12, 23, 318 N.W.2d 558 (1982),

and to award these for three years prior to suit, *Slayton v. Michigan Host, Inc., supra,* will be severely compromised. The opinion makes no distinction between Michigan agency proceedings and court proceedings. So a plaintiff who proceeds solely through the Michigan Department of Civil Rights and files her court complaint more than six months after the discriminatory act will evidently be time-barred.

Indeed the Sixth Circuit opinion proves to much. The vast majority of Title VII cases concern some application and interpretation of a CBA, especially those against unions. See e.g. *Macklin v. Spector Freight Systems, Inc.*, 478 F.2d 979 (D.C. Cir., 1973); *Causey v. Ford Motor Co.*, 516 F.2d 416 (5th Cir., 1975). The opinion hardly effectuates Congress' intent that the "policy of outlawing such discrimination should have the highest priority." *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 763 (1976). The theme of the Civil Rights Act is cooperative federalism; that of the LMRA is preemptive federalism. The purpose of the LMRA is to consecrate contracts between employers and unions; the purpose of Title VII is to work with states in eradicating discrimination.

C. A State Claim Cannot Be Preempted Where The Federal Issue Arises Only In The Defense And Not The Claim Itself.

Section 301 only entered the district court's alternative holding as an affirmative defense. (Appendix B, App. 80a-81a)

Petitioners did not base count I of their complaint on the antidiscrimination clause, the seniority clauses, or any other clause of the contract. The complaint stated no claim under 301.[5] Rather the claim is based on a violation of Michigan's

[5]The district court did partially based its holding on the contract. But the appeals court reversed that reversal, and petitioners do not contest that reversal.

law against sex discrimination. 37 MCLA § 2204(a)-(d). That law can premise discrimination on *entering into* a discriminatory agreement where none previously existed. *Farmer v. ARA Services,* 660 F.2d 1096 (6th Cir., 1981). The acts of obtaining the Committee decision and entering into the special bid agreement complained of here were neither required nor prohibited by the CBA. "No seniority plan forced the union to ignore, mislead, or segregate the female office workers." (Appendix B, App. 73a (Merritt concurring and dissenting)), a proposition the majority did not dispute.

The panel majority faulted the district court for finding the union liable under the state law without referring to § 37.2211 which recognizes that it is not illegal to act pursuant to a bona fide seniority or merit system. (Appendix B, App. 55) It is true that the district court did this, as shown by the district court's finding of a prima facie case. Appendix A, App. 24a-33a.

But, the reason is that the issue of a bona fide seniority system is an affirmative defense, *Stewart v. General Motors,* 542 F.2d 445 (7th Cir., 1976). Accordingly Judge Taylor addressed the bona fides of the seniority system extensively, but only in reply to that defense. Appendix A, App. 36a-44a.

The majority's view conflicts with *Caterpillar, Inc. v. Williams,* _____ U.S. _____, 107 S. Ct. 2425 (1987). *Caterpillar* confronted the company's argument that 301's preemptive force was so strong as to preempt a state claim even when raised as a defense. The Court rejected this approach, noting that a defendant could then select its forum, and the plaintiff could not control her complaint. 107 S. Ct. at 2433.

After the panel's correct ruling rejecting the district court's first ground, the CBA language only entered the case as part of the union's defense. It was not part of the sex claim itself,

and accordingly under *Caterpillar, Inc.* the sex claim is not preempted.

D. A Seniority System Which (1) Allows Men But Not Women To Temporarily Transfer At Higher Pay, (2) Irrationally Places The Clerical Women In One Unit, (3) Had Its Genesis in Sex Discrimination, And (4) Is Maintained With An Illegal Purpose Is Not Bona Fide Under The Four-Factor Test Adopted By Other Circuits.

Title VII and the Elliott-Larsen Act follow the same standards for liability. (Appendix A, App. 3a). The Fifth Circuit has set out a four-fold test for determining whether a seniority system is bona fide, following this Court's decision in *Teamsters v. U.S.*, 431 U.S. 324 (1977). The factors are:

1) whether the seniority system operates to discourage all employees equally from transferring between seniority units;

2) whether the seniority units are in the same or separate bargaining units (if the latter, whether that structure is rational and in conformance with industry practice);

3) whether the seniority system had its genesis in racial discrimination; and

4) whether the system was negotiated and has been maintained free from any illegal purpose.

James v. Stockham Valves and Fitting Co., 559 F.2d 310, 352 (5th Cir., 1977), cert. denied, 434 U.S. 1034 (1978). This test has been approved in other cases by other circuits, including the Sixth Circuit. *Sears v. Bennett*, 645 F.2d 1365, 1372 n.

5 (10th Cir., 1981); *Hameed v. International Association of Bridge, Structural and Ornamental Iron Workers*, 637 F.2d 506, 517 (8th Cir., 1980); *E.E.O.C. v. Ball Corp.*, 661 F.2d 531 (6th Cir., 1981).

As shown above, there was no community of interests unique to the women in the office. Clerical employees were scattered throughout the terminal, and no rational purpose was served by keeping the women clericals in one "unit." The system discriminatorily favored men over women in terms of pay when temporary cross-bumping occurred. The practice of allowing clerical men to cross-bump with seniority to driver jobs was an industry aberration. Though the system was created before Title VII or Elliott-Larsen took effect, it was created to favor men. After the laws were passed, the union maintained it and always explained the disparities by reference to petitioners' sex, not to the seniority system. Each of the four factors are implicated in these findings, none of which have been reversed. (Appendix A, App. 36-44a)

Yet the court below simply reversed on the basis of the district court's first ground, and made no findings whatever on the four factors. It did not even acknowledge case law on the point. (Appendix B, App. 59-61) It simply found that the office workers were in a separate bargaining unit, and that therefore their bumping rights extended only within that unit.

But that does not speak to the facts. Under the test acknowledged by all courts, the system is not bona fide. Accordingly, it does not rebut petitioners' prima facie case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioner

89-290

No.

IN THE

Supreme Court of the United States

October Term, 1989

FRANCIS JONES, BEVERLY HARDER,
ELEANOR MURRAY, LINDA NICKEL,
and MARY RUANE

Petitioners,

vs.

TRUCK DRIVERS LOCAL UNION NO. 299

Respondent,

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

FRANCIS JONES, BEVERLY HARDER, ELEANOR MURRAY, LINDA NICKEL, and MARY RUANE, Jointly and Severally,

Plaintiffs,

Case No. 78 73078

v

Honorable Anna Diggs Taylor
CASSENS TRANSPORT and LOCAL 299 I.B.T., Jointly and Severally,

Defendants.

MEMORANDUM OPINION AND ORDER

Plaintiffs, five female office employees of the Square Deal Cartage Company until it was purchased by defendant Cassens Transport and they lost their jobs in August, 1977, filed their complaint in this matter in Wayne County Circuit Court for the State of Michigan on November 16, 1978. They claimed that both defendants had discriminated against them because of their sex, in violation of the laws of Michigan, in refusing to permit plaintiffs to bid or apply for jobs at Cassens because they were women. The complaint further charged the union with breach of its duty to fairly represent plaintiffs, either in negotiations with defendant Cassens concerning the job rights of Square Deal employees, or in a grievance against defendant Cassens' refusal to hire plaintiffs.

Defendant Local 299 petitioned for removal to this court on November 30, 1978, because the claim for breach of a duty of fair representation presented a federal question under § 301 of the National Labor Relations Act, 29 U.S.C. § 185*et seq*, and because a federal question of the violation of Title VII of the Federal Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq*, had been raised. Removal was proper, and this court's jurisdiction is appropriate. 28 U.S.C. § 1441.

As amended complaint was filed February 27, 1979, adding claims of defendants' violations of Title VII, 42 U.S.C. 2000e *et seq*. Plaintiffs Jones, Harder, Murray and Ruane had filed charges and obtained Right-to-Sue letters from the United States Equal Employment Opportunity Commission dated January 22, 1979 against Cassens, but not against Local 299. Plaintiff Linda Nickel had filed no charge and received no letter.

Plaintiffs had also filed charges with the National Labor Relations Board in January, 1978, that unfair labor practices had been committed by Cassens Transport in its alleged refusal to hire them because of their union membership. Those charges were later resolved by a settlement which included plaintiffs' waiver of any right to office jobs at Cassens as one of its terms. This court, nevertheless, took evidence at trial herein concerning Cassens' failure and refusal to hire plaintiffs into its office. That evidence is relevant to the issues of sex discrimination and fair representation presented herein, despite the settlement's preclusion of a grant of office work at Cassens to plaintiffs as a remedy here available.

At the bifurcated trial on the issue of liability, both defendants moved to dismiss at the close of plaintiffs' case, pursuant to Rule 41(b) of the Federal Rules of Civil Procedure. The motion of defendant Cassens was denied, inasmuch as plaintiffs had made a *prima facie* case of intentional sex discrimination under both Title VII and under Michigan's

Elliott-Larsen Civil Rights Act, M.C.L.A. § 37.2101, pursuant to which the same standards are to be applied. *See Michigan Civil Rights Commission ex rel. Boyd v. Chrysler*, 80 Mich. App. 368, 263 N.W.2d 376 (1977); *Clark v. Uniroyal*, 119 Mich. App. 820, 327 N.W.2nd 372 (1982); and *Northville Schools v. CRC*, 118 Mich. App. 573, 325 N.W.2d 497 (1982).

This court granted the union's motion to dismiss plaintiffs' Title VII claim for their failure to have presented any charge against the union to the EEOC. After trial, this court reinstated the Title VII claim under authority of the subsequently decided case of *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982), in which the Supreme Court stated that:

> By holding compliance with the filing period to be not a jurisdictional prerequisite to filing a Title VII suit, but a requirement subject to waiver as well as tolling when equity so requires, we honor the remedial purpose of the legislation as a whole without negating the particular purpose of the filing requirement, to give prompt notice to the employer.

(102 S.Ct. at 1135)

As is fully discussed below, both defendants herein had pursued a course of secrecy and concealment of rights in their dealings with the plaintiffs; and plaintiffs each testified that they were told by EEOC personnel that the EEOC could afford them no relief against the union when they filed their charges against the employer. Accordingly, this court determined this to be a case in which equity required waiver of the requirement.

Also, the court denied defendant union's Rule 41 motion to dismiss plaintiffs' claim of breach of the duty of fair representation, and pendent thereto retained plaintiffs'

discrimination claim against the union under the Michigan Elliott-Larsen Civil Rights Act.

After trial, the court entered a judgment of liability May 2, 1982 for plaintiffs on all of its claims both defendants by a Memorandum Opinion published at 538 F.Supp. 929. Thereafter both defendants appealed, and during the pendency of the appeal defendant Cassens settled with plaintiffs. 705 F.2d 454 (6th Cir. 1982). The Court of Appeals for the Sixth Circuit thereafter (by opinion published at 748 F.2d 1083 November 29, 1984), reversed this court, dismissed plaintiffs' Title VII and fair representation claims, and remanded plaintiffs' Elliott-Larsen claim to this court for reconsideration. The Title VII claim was dismissed because that court found no basis for setting aside the requirement that plaintiffs file a charge against defendant union with EEOC: and the fair representation claim was dismissed in light of this circuit's decision to retroactively apply the six-month statute of limitations adopted for such claims in *Delcostello v. Teamsters*, 462 U.S. 151, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983).

In remanding the Elliott-Larsen claim to this court, the Sixth Circuit panel wrote:

> We are unable to determine from the opinion below whether the District Judge found that the union's actions constituted illegal exclusion or expulsion from membership, classification or segregation of membership, efforts to cause or attempt to cause Cassens to violate the Elliott-Larsen Act, failure to adequately represent plaintiffs in the grievance process, or a combination of some or all of those prohibited activities. We, therefore, remand plaintiffs' state claim to the District Court for reconsideration in light of this opinion.

The parties have submitted their briefs on the issues raised by plaintiffs' Elliott-Larsen claim, and this memorandum opinion constitutes this court's findings of fact and conclusions of law, on remand, on that count alone.

At the outset, this court must note that it rejects the request of defendant union that it decline to retain jurisdiction of this pendent state law claim, the last remaining claim in the case. If the case had reached this posture before the month-long trial of 1982, the appeal, and the remand, this court would certainly entertain the request under a more favorable light. At this point however, plaintiffs—five women who lost their clerical jobs in 1977—will not be required to seek yet another forum for their grievance. The manifest injustice of dismissing this last claim without a decision on the merits would not even constitute a realistic conservation of judicial resources.

Michigan's Elliott-Larsen act provides at M.C.L.A. § 37.2204, as follows:

Sec. 204. A labor organization shall not:

> (a) Exclude or expel from membership, or otherwise discriminate against, a member or applicant for membership because of religion, race, color, national origin, age, sex, height, weight, or marital status.
>
> (b) Limit, segregate, or classify membership or applicants for membership, or classify or fail to refuse to refer for employment an individual in a way which would deprive or tend to deprive that individual of an employment opportunity, or which would limit an employment opportunity, or which would adversely affect wages, hours, or employment conditions, or otherwise adversely affect the status of an employee or an applicant for employment because

of religion, race, color, national origin, age, sex, height, weight, or marital status.

(c) Cause or attempt to cause an employer to violate this article.

(d) Fail to fairly and adequately represent a member in a grievance process because of religion, race, color, national origin, age, sex, height, weight, or marital status.

Plaintiffs herein claim that the defendant union has violated all four of the above-quoted statutory prohibitions, and this court so finds, for the reasons outlined below. On June 3, 1976, defendant Cassens Transport, the Square Deal Cartage Co., and Gate City Transport Co. executed a contract by which Cassens was to purchase all property and assets of Square Deal and Gates. All three companies were engaged in the business of hauling new automobiles by truck, and they utilized contiguous premises as their Detroit Terminals. At that time, the five female plaintiffs herein were employed in the Square Deal Detroit Terminal Office as clerical workers; and were represented by defendant Local 299 as were most of the employees of all three companies. Mr. Wilson Holsinger, who was Director of the Teamster Carhaul Division during the events herein litigated, testified that he had helped organize the Square Deal office in 1958, and gained recognition by a showing of cards to represent the officeworkers, while he was the Square Deal steward for yardmen and drivers. The execution of Cassens' purpose of Square Deal was delayed until August 26, 1977, because of the necessity for federal regulatory approvals of the transaction. It was on that date that plaintiffs were each called into the Square Deal Manager's office, individually and alone, and notified by management of the termination of their employment. The last and most senior

of the plaintiffs, Ms. Jones, had worked her last day by November of 1977. Due to the union's efforts during the year-long interim between the 1976 contract and the 1977 closing, all other Square Deal employees, all of whom were male except the secretary to the chief operating officer and receptionist, had moved to work at Cassens on the date of the takeover with full seniority. The union's efforts on behalf of the Square Deal work force, except for plaintiffs, had commenced through meetings with Cassens beginning immediately after the June, 1976 contract of sale, more than a year prior to plaintiffs' job loss.

Cassens did continue an office function thereafter and, indeed, expanded it considerably after the absorption of Square Deal's work force with additional new male hires into its office. The President of Square Deal from 1974 to 1977, Mr. Harold Jones, became the Terminal Manager of Cassens. Mr. Jones had started with Square Deal in 1948 and worked in managerial positions since the mid-fifties. The strong opinions which he had expressed and implemented at Square Deal, relating to female employees, may fairly be said to have been with him taken to Cassens. The defendant Local 299 had organized the employees of Cassens, Square Deal, and Gates over twenty years prior to this consolidation and it is undisputed that the terms and conditions of employment of all employees affected by these events were governed by the Teamsters National Master Automobile Transporters Agreement, the Central and Southern Conference Area Supplements thereto (specifically Truckaway, Driveaway, City Delivery, Yard and Garage Workers', and the Michigan Office Workers' Supplements thereto). All contracts were effective by their terms from June 1, 1976 through May 31, 1979.

At Square Deal, Local 299 had historically represented employees on three seniority lists, and defendants herein have

designated (improperly, as will be seen) each of those lists as a "separate and distinct bargaining unit."

Plaintiffs were on the office seniority list; and it is that alleged distinctiveness as a bargaining unit which defendants claim required their preclusion from competing for any jobs whatsoever at Cassens. The garage employees at Square Deal were on another seniority list; and the third list included all drivers and all yardmen, as well. At Cassens the office was not organized, and there was no garage, but there were two seniority lists: one for drivers and one for yardmen. The practice of listing drivers and yardmen on separate seniority lists was the usual pattern in the autohaul industry, and Square Deal's combined driver-yard list was a rare aberration. It was the only employer in the Detroit area with a combined list. That list was implemented by Square Deal on the union's petition (after a referendum of all drivers and yardmen) in 1958, which was the year the office was organized. It is the existence of this aberrational driver-yardmen list, which defendants insist constituted one "distinct bargaining union," which led to the difficulties at hand.

All employees concerned here worked under the Teamsters Master Transport Agreement, which provided as follows concerning the supplements thereto:

> All such Supplemental Agreements are subject to and controlled by the terms of this Master Agreement and are referred to herein as "Supplemental Agreements." All such Supplemental Agreements are to be clearly limited to the specific division and classifications of work as enumerated or described in each individual Supplement. (Article 2, p. 3)

* * * * * * * * * * *

> The employees, unions, employers and Association, covered by this Master Agreement and the various Supplements thereto shall constitute one bargaining unit. It is understood that the printing of this Master Agreement and the aforesaid supplements in separate Agreements is for convenience only and not intended to create separate bargaining units.

The Master Transport Agreement further provides as follows, here pertinent,

> The Employer and the Union agree not to discriminate against any individual with respect to hiring, compensation, terms or conditions of employment because of such individual's age, race, color, religion, sex, or national origin, nor will they limit, segregate or classify employees in any way to deprive any individual employee of employment opportunities because of age, race, color, religion, sex or national origin.

* * * * * * * * * * *

> In those terminals where classification seniority applies, the parties agree that in filling vacancies with qualified employees which occur subsequent to the execution of this agreement, the principle of carry-over terminal seniority shall be recognized. In the event that the Employer and Local Union fail to formulate a Rider which provides for the filling of vacancies consistent with the foregoing provision, the Joint Area committees shall have authority. (Article 26, p. 57-58).

* * * * * * * * * * *

Terminal seniority rights for employees as provided under this Agreement and all Agreements supplemental hereto shall prevail. (Article 5, § 1, p. 16).

* * * * * * * * * * *

Merger, purchase, acquisition, sale, etc:

(1) The terminal seniority lists of the two companies should be dovetailed so as to create a Master Seniority list or lists based upon total years of service with either company. This is known as "dovetailing" in accordance with years of seniority. (Article 5, p. 17).

* * * * * * * * * * *

...The Conference Joint Arbitration Committees provided in the National Master Automobile Transporters Agreement ~~or~~ the Supplemental Agreement shall have the authority to determine the establishment and application of seniority in those situations presented to them. In all cases, the seniority decisions of the National Committee of Conference Joint Arbitration Committees...shall be final and binding. (Article 5, § 4, p. 23).

Plaintiffs herein were represented by Local 299 not only under the above-quoted Master Agreement, but under the Teamsters Michigan Office Workers Supplement thereto, to which Square Deal was a signatory employer but defendant Cassens was not, as its office was not organized. The Office Supplement's relevant provisions concerning seniority (at Article 39) were as follows:

Company seniority for employees governed by this

> Agreement shall be defined as the period of employment with the Company since the employee's last date of hire. Terminal seniority for the employees covered by this Agreement shall be defined as the period since the employee's last employment at the physical location covered by this Agreement. (Article 39, § 1, p. 4).
>
> The Company shall prepare a company seniority list and Terminal Seniority list within 30 days of the signing of the Agreement. One copy of such list shall be furnished to the Union and one copy shall be posed in a conspicuous place in the terminal. Any objection to either company and/or terminal seniority on the part of an employee must be filed with the company within 7 days of the posting of this list.
>
> This seniority list shall be amended to include all changes each 90 days and the same provisions for appeal against company and/or terminal seniority dates reported thereon shall apply. . . (Article 39, § 6, p. 7).

The Yardworkers' Supplement, Part IV of the Master Transport Agreement, governed the employment of yardmen of both Cassens (who were listed on a yard seniority list) and of Square Deal (who were listed on the merged yard-driver list) at the time of the acquisition. As to seniority, the Yard Supplement provided:

> Seniority shall be recognized on job assignments whenever practicable, provided the senior employee can qualify. (Article 76, § 2, p. 172).

Cassens had no garage workers until it absorbed those of Square Deal, on August 26, 1977. At all times relevant hereto, defendant Union represented them under the *Garage* Supple-

ment of the Master Transport Agreement. That supplement provided as follows, concerning seniority:

> § 1(a) Company garage seniority shall be determined by the time and date each employee's payroll earnings begin, as of his last hire-in date.
>
> (b) Garage employees shall not bump into any other division nor shall any employee from another division exercise seniority in the garage.
>
> (c) Classification seniority shall commence at the time and date each employee's payroll earnings begin in such classification.
>
> * * * * * * * * * * *
>
> § 4 A current seniority list, complete with classification date and employment date, must be posted where it will be accessible to the employees at all times, and a copy of same shall be mailed to the Union. (Article 80, p. 176, 176).

Despite all of the above provisions there is no evidence that any seniority list was ever posted at Square Deal, between 1955 and 1977. Those plaintiffs who had seen any of the three lists which were maintained had seen them because plaintiff Frances Jones was occasionally called upon to type them.

The above-quoted collective bargaining agreement clauses recognize classification seniority, terminal seniority and company seniority, and uniformly require that terminal or company seniority shall prevail, with the one exception of the prohibition of bumping into or out of the garage "division." Only one single bargaining unit is recognized, and even the garage community is distinguished by the appellation "division," rather than "bargaining unit." Only in the garage, moreover, is *classification* seniority recognized, and accordingly required

to be listed. It is also noteworthy that, despite all of the above requirements, Square Deal maintained no company seniority list or terminal seniority list, whatsoever. If it existed, it has never been mentioned or produced at any time relevant hereto. Similarly, if Cassens ever had a terminal or company seniority list it was not utilized, mentioned or produced during the events here under examinationor at trial. Defendants herein utilized only *classification* seniority lists to determine job entitlements at the time of the Cassens' acquisition of Square Deal; they utilized one list which was unique in treating two different all-male classifications as one while excluding a third (female) classification from that benefit; and they did so in violation of every applicable contract clause and of the arbitral decision on which they here rely, as well.

Long before the Cassens acquisition of June 1976 was to be effectuated, the questions arose to how Square Deal employees would be transferred to Cassens. Square Deal had its longstanding yard-driver seniority list; but an employee, once placed on Cassens' yard list would no longer have status to bid for driving routes while maintaining simultaneous seniority in both yard and driver classifications as he had done at Square Deal. At Cassens, a driver would not be able to bid for yard work when he could not drive, as was also done at Square Deal. It had been a foregone conclusion, however, that all garage personnel would transfer from Square Deal with full seniority and would become the Cassens' garage staff; and that is what happened. As to the Square Deal office workers; union witnesses testified that their future was never discussed; and Cassens' witnesses claimed, to the contrary, that the position was taken *ab initio* that Cassens would not accept them, and that the union had always known that fact.

Apparently to resolve the only open question, which was the question of who would be listed in the Cassens' yard or

would transfer as a driver, in August of 1976, (more than a year before the acquisition's effective date) Cassens President, Jerry Shashek, filed a grievance with the Joint Arbitration Committee of the Central-Southern Conference of Teamsters:

> ...for determination with respect to establishment of seniority board at Cassens Transport Company arising out of the purchase by Cassens Transport Company of Square Deal Cartage Company and Gate City.

That submission was made pursuant to the above-quoted Article 5, § 1(1) ("Mergers," at p. 17) of the National Master Transport Agreement. The question was referred to a subcommittee on August 28, 1976; and that subcommittee's subsequent report indicates that it "...met on Tuesday, September 21, 1976 with all interested parties *including employees from the various companies involved in these proceedings.*" [Emphasis added.] Defendant Local 299 is recorded as having represented the employees, and having "stated it preferred the employees' company seniority be used." Wilson Holsinger testified that he presented the union's position, and argued for "Master" seniority. None of the female plaintiffs herein even knew that this event was occurring.

Clearly, the Holsinger presentation narrowed the Shashek request for a determination of a *company seniority board* down to a concern about drivers and yardmen, only. This omitted from consideration the garage unit (which was assured of transfer as a separate division, as recognized industrywide) and the office "unit" of eight women among twenty office workers, whom Cassens had already told the union it would not accept. The decision ultimately issued reflects the narrowing of issues which had occurred at hearing.

The subcommittee's Decision of January 31, 1977 was first, that all drivers of the merged employers be dovetailed by years of service. As to the yard at Cassens, the decision was:

> (a). Cassens practice of maintaining separate yard seniority list shall be maintained. (Referring to present 8 Cassens yard employees, plus 7 from Square Deal and 2 from Gate City.)
>
> (b). The new yard seniority list, after merger, shall be prepared in the same way as the driver's list, by master seniority as provided in Article 5, Section 1, Subsection (1) and (2). Reference to the cited Article reveals that "Master" seniority is a term used by these parties interchangeably with *company* seniority, meaning "total years of service with either company." The Decision, accordingly, does not preclude the inclusion of any classification into the new yard list.

On February 4, 1977, the Joint Arbitration Committee adopted the report of the Subcommittee. Until August 25, 1977, however, none of the plaintiffs had heard any more of this activity than the same rumors of the sale of Square Deal which had commenced in 1975. No one advised them of the fact of a June 1976 sale, or of the arbitral adjudication, or even of the hearing to which employees had, according to the record, been invited. Union representative Holsinger testified that he could not recall ever discussing plaintiffs' future with them, prior to the actual Cassens' takeover of August 26, 1977; that he had hoped and expected that Cassens would take them, but had made no inquiries in that regard; that he had known Cassens had a non-union office, but had thought plaintiffs would be accepted up until August 25, 1977; and had told them not to worry. Plaintiff Nickels asked Cassens' Chief Dispatcher Belevender, during this period, about the rumor

of the sale and of its impact on plaintiffs' jobs. He responded that "we're watching for the good workers, to take them to Cassens." The employer's agents, like the union's, continued to tell plaintiffs not to worry, until the effective date of the transfer.

After the adjudication, Cassens, Square Deal and the union had to determine *which seven* Square Deal employees would obtain places on the Cassens' yard list. It was decided to hold a Bid among the all-male Square Deal yard-driver listees. All yarddrivers who did not bid for those seven places, or whose bids were unsuccessful, would transfer their seniority to Cassens as *drivers*, if eligible. No notice of this Bid was posted. Notices were handed through the Dispatch window at Square Deal to each individual who was considered eligible, according to Cassens' present Terminal Manager, Harold Jones. Those individuals were the yard-driver listees. The all-male yardworkers from the Square Deal Terminal in Toledo were also given notice and the opportunity to participate. The Bid was held from August 20 through September 6, 1977.

If plaintiffs had been permitted to participate in the Bid with their terminal or company seniority, it is undisputed that at least three of them would have won jobs in Cassens' yard at that time. Cassens accepted eleven male bidders, including three with less Terminal seniority than any plaintiff herein. It is also undisputed that Cassens immediately thereafter made several new male hires into its yard, for a total of 19 new persons, as opposed to the 9 contemplated by the arbitral order. By September 29, 1977, it employed 21 in the yard. The yard continued to be all male, as it always had been, and as had the Square Deal yard as well, despite plaintiffs' numerous requests.

Plaintiffs were summoned to the Square Deal executive offices individually and terminated on August 26, 1977. The on-

ly Square Deal office employees accepted by Cassens were six men who were not members of the union's all-female office "unit" and the transferring chief executive's secretary and receptionist.

The union has claimed, here, that it first learned that Cassens would not accept the women of the Square Deal office on August 25, 1977. The testimony concerning the transactions of union autohaul Director Wilson Holsinger is completely incredible, however, and cannot be accepted as other than an inconsistent attempt at the fabrication of a coverup. Defendant Cassens acknowledges that it never at any time intended to employ the women. It had always said it would not accept them. The union's claim that it never knew of the employer's intention until closing day, despite the year of discussions on employment rights, the two adjudicatory events in which both sides participated to the exclusion of the women, and the conduct of the Bid again, in secrecy and again to the exclusion of the women, is not credible.

Moreover, even if it is true that the union never thought of the women until Square Deal's last day of existence, its breach of its duty to them and the discriminatory character of its conduct toward them remain clear. Any questions are answered by the union's historic sex-based animus towards the women as unit-members, and its long history of disparate and less favorable treatment of women as competitors for jobs which men might seek, often for the state reason of their sex. Square Deal's management (which became Cassens' Management on August 26, 1977) had made it absolutely clear, over the years, that women were not wanted in the yard, as they "made trouble." There is also undisputed testimony herein that Cassens' president did not want women in the *Terminal:* and that testimony is corroborated by all of the facts here presented, although President Shashek was not a witness at trial.

Mr. Holsinger's incredible story is that, on the afternoon of August 25, 1977, Cassens' President Shashek told him (for the first time) that the Square Deal women would not be accepted by Cassens, "because of their union membership." Thomas Deedy, defendant union's Business Agent for Square Deal from 1974 through 1977, was also present. His testimony confirmed Holsinger's: Shashek stated that he wanted no union members in his office. Neither Holsinger nor Deedy claim to have raised any protest to Shashek at the time; and Holsinger testified that he took no action against Shashek or Cassens thereafter because he was unaware that such an exclusion of union members was unlawful, or an unfair labor practice.

What Messrs. Holsinger and Deedy did next was to invite two of the plaintiffs to meet them at a nearby bar that evening; and to advise the two women (in the bar) that Cassens had no jobs for the women officeworkers *because its office was computerized.* Holsinger and both women testified that he told them he sympathized with them, he would file a grievance on their behalf, and that he was leaving (on August 26th, the Cassens takeover date) on an extended business trip. He also, undisputedly, asked the women if they were willing to attend computer schools, independently, while he awaited the outcome of their grievance. They undisputedly agreed to pursue computer training on their own.

The women further insist, however, that on this occasion at the bar they not only agreed to seek computer training, but also asked for other work in or out of the office, with or without seniority, in any capacity, at Cassens. Holsinger and Deedy deny any such requests. Inasmuch, however, as these gentlemen undisputedly told the women a falsehood, if indeed Shashek had just rejected them (for the first time) for union membership and not for their lack of computer training, the court most certainly cannot resolve other credibility problems

arising from that same conversation in the union's favor. It is noteworthy that Business Agent Deedy, at that meeting of August 25 in the bar, knew that the next morning, August 26th, he would execute (on defendant union's behalf) a ninety-day casual agreement to permit a group of three young men to start work as clerical Yard Inspectors at Cassens. Before the expiration of that casual agreement in November, Cassens had hired those young men into permanent jobs, and trained those young men to operate its computers.

Both Holsinger and Deedy steadfastly contend that no plaintiff ever in 1977, in the bar or elsewhere, asked them for yard work at Cassens. Defendant Cassens claimed, however, that the women did indeed demand yardwork after being foreclosed from their office jobs, but that Cassens always understood them to be demanding yard work with full seniority. Accordingly, Cassens claimed that it was precluded from offering plaintiffs yardwork (or any work) *without* seniority, or as new hires, even though such positions became available. Moreover, Cassens claimed (through former Square Deal President Jones) that plaintiffs never asked to apply as new hires for any job. Even the employer's witnesses are, in this area, totally contradictory of the union's claims.

The court credits the testimony of the two plaintiffs who, upon being summoned to the bar by their representatives and advised of their forthcoming discharge, testified that they asked for their office jobs, or for yard jobs, or for work in any capacity, as new hires or not. Their testimony was that Holsinger told them again not to worry, as he would continue to work to preserve their office jobs. As to yard jobs, however, he told them they could not bid on such work and could not perform it; indeed that they could not make it through a winter in the yard.

The next day, August 26, 1977, was the effective date of

the sale of Square Deal. Each of the women office workers was called, alone, into an executive office and discharged. The record indicates that Holsinger filed the promised grievance on that date, requesting hearing by the panel which had earlier adjudicated the seniority list merger, of the question whether Cassens was obliged to accept Square Deal officeworkers. Also on that date, Business Agent Deedy executed the aforementioned ninety-day casual agreement with Cassens for hire of male clericals. Deedy testified that he did so because at the end of August there was an abundance of work on hand at Cassens; far more than all of the employees of the merged companies could have handled, put together. Such an unprecedented increase in volume had occurred that it was clear to Deedy that it would not be under control for a long while. Finally, on August 26, Mr. Holsinger left on his business trip for two weeks, and remained inaccessible to plaintiffs for more than a month; until he visited the Square Deal office and those employees who yet remained to close its affairs, on September 30, 1977. He testified that "my schedule did not permit me" to contact them for "several weeks" because he had meetings in Louisville and Kansas City, and several important local meetings thereafter, as well.

By Monday, August 29, 1977, the plaintiffs had learned that yard work was definitely available at Cassens; and some had learned further that a Bid was being or had been conducted to obtain it. The plaintiffs were still working in the Square Deal office until their respective termination dates, which had been scheduled in inverse order of their office seniority; and they could see the three new young male yard inspectors; working at Cassens' contiguous premises. The plaintiffs (who had been told no more than had been disclosed at the bar) decided to request a meeting with Cassens President Shashek and a union representative. They called the union hall and were advised by Mr. Deedy not only that Holsinger was indefinite-

ly unavailable, but that Deedy himself was otherwise engaged and would attend no such meeting. Deedy testified that plaintiffs did not mention yardwork during that call, and they if they had, he would have told them their position had no merit. He never told Holsinger of their call, and testified that he never thereafter heard from any of the women again.

The status of plaintiffs' union representation after August 26th is another interesting and open question, on this record. They did not know who their steward was. Although both defendants stoutly maintain the separateness and distinctness of the office bargaining unit, that "unit" never had its own steward because, according to Holsinger, a Local 299 rule required a unit to include at least fifteen persons, to merit a steward. The Garage Unit, however, included fewer than fifteen persons and had never been without a steward, while the office had shared its steward *with the drivers and yardworkers* since 1958, notwithstanding the alleged total disparity of interests of those groups and separation of their units. The office staff included twenty persons, of whom only eight (all of them women) were included in the "unit." Holsinger had been the drivers, yard and office steward until he joined the union staff in 1974; and it is unknown to this record who the steward was for drivers, yard, and office, on August 29, 1977. Whoever that person was, however, it is safe to say that he had moved to Cassens with the drivers and yardmen, and was no longer available to plaintiffs.

Moreover, the women were ignorant of their entitlement to a steward, anyway; although the most senior plaintiff, Frances Jones, had paid union dues since April of 1958. No plaintiff had ever filed a grievance; and several testified to their belief that the union and the contract book existed for the benefit of the drivers only. They had never known who their steward was, if any, and plaintiff Frances Jones had called the

Toledo Terminal Local 299 steward, at one point, for reassurance of their continued employment. Over the years, in the face of such disparities in treatment, the women testified that they had been afraid to complain because they needed their jobs, and Square Deal supervision had frequently reminded them of that fact.

So, in the face of Business Agent Deedy's refusal to represent them, plaintiffs called the Square Deal Garage Steward, Glen Karkeet, to come up to the office and represent them in their meeting with Cassens' President Shashek. Karkeet went up to the office immediately, but told plaintiffs he was "only the garage steward" and without any authority in the matter. He, too, called Deedy by telephone to come represent the women, and Deedy again advised "...that there was no way I would have anything to do with it." When the Cassens President arrived, Karkeet testified that he told Shashek "these women want to know if they have jobs," because it was common knowledge throughout the premises that the women simply wanted jobs. Shashek, however, directed Karkeet back to his duties in the garage, forthwith, and met with the unrepresented women in he presence only of Harold Jones. What was said is, once again, hotly disputed.

The women testified uniformly that, once again, they asked first for office jobs; then to bid into the yard; then for work in any capacity, with or without seniority, or as new applicants. President Shashek, undisputedly, said that Cassens did not employ women in its Terminal; that no jobs were available either in the office or the yard; and that no woman had ever worked in Cassens' yard and none ever would, "and that's final." However, in his testimony Mr. Jones stoutly denied plaintiffs' uniform claim that Shashek also stated that no applications were available for new hires, and that none would be accepted or filed for future consideration as had been Square Deal's longstanding practice. Jones did not deny that each plain-

tiff tried to describe her qualifications for yardwork, (i.e., ability to change a tire, jump a battery, drive a car, etc.); and did not deny his longstanding prohibition of women in the yard because they might "make trouble." Jones simply insisted that plaintiffs were told they were a "separate and distinct bargaining unit," ineligible to bid by seniority into the yard. Thereafter, he denied any plaintiff, then or later, ever asked to be hired as a new employee in any capacity or ever asked for an application. Mr. Jones insisted that plaintiffs only sought consideration as bidders into the yard, with full seniority. Cassens' witness made no mention whatsoever, during trial, of either their lack of computer training or their union membership. In the totality of circumstances presented, this court credits the plaintiffs' uniform and consistent insistence that they requested consideration on every basis conceivable to them at the time, and were rejected.

Plaintiff Jones, the most senior of the women, worked until November 12, 1977, closing out Square Deal's offices; and on that date she filed three grievances. On two of them, regarding unpaid sick and holiday pay, she ultimately prevailed, although no monetary remedy was awarded, she testified, because Square Deal had become nonexistent in the interim. The third grievance protested Cassens' refusal to employ any of the Square Deal women office-workers. Local 299 President Lins wrote her, in response, that it would be heard by the same Conference committee to which Holsinger's grievance had been referred. Lins did not direct the grievance to that panel however, but diverted it to a Michigan *Officeworkers'* panel instead, which was without authority to grant the expansive relief which a Conference committee was empowered to afford, such as yardwork. Both the Holsinger and the Jones grievances were denied in January of 1978, and there is no indication of record that the union made any presentation on behalf of either grievance.

When Holsinger's allegedly more pressing duties had subsided, on September 30, 1977, he went to visit those few plaintiffs still at the Square Deal office, because he "felt sorry for them, as a personal friend," and to give them a copy of his August 26th grievance. They renewed their plea for union intervention to obtain yardwork, and as a personal friend he again advised them that they could never survive a winter in the yard. He denies, however, that any request for yardwork was made on this or any occasion, and again this court is unable to credit his version of the facts.

The credible facts of record here clearly demonstrate that, in competition for the better jobs historically; and for any jobs at the end, the plaintiff women were the victims of intentionally desperate and less favorable treatment than the similarly situated male employees at Square Deal whom this union represented. Both the union and employer intentionally discriminated against them, albeit for somewhat different reasons. Employer management, in the person of Messrs. Jones and Shashek, had a sex-based animus against female workers on the premises. The union pandered to that animus in its zeal to represent its male members (and even male outside applicants for jobs) at the expense of the women, whom it considered to be no more than an auxiliary to the real bargaining unit, and a source of unobligated dues for twenty years. The union's testimony was consistent that plaintiffs had the more *"pleasurable"* jobs, and were not considered for the better *paid* jobs, or those which afforded overtime and/or less likelihood of layoff. Both defendants made obvious misrepresentations both to plaintiffs and to this court. The secrecy in which the defendant union disposed of plaintiffs' interests adds to the incredibility of its several conflicting and contradictory versions of these events. In short, only plaintiffs and the Garage steward, Karkeet, appear credible in their narrative of events as they saw them.

Defendant union, this court finds, breached its duty to fairly represent plaintiffs, under the circumstances presented. The standards applicable to such a claim were definitely stated in *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967) in which all unions certified under the National Labor Relations Act were held to have the statutory duty to represent all employees in the collective bargaining union fairly, both in collective bargaining with the employer, and in enforcement of any resultant contract. That duty includes the obligation to serve the interests of all members without hostility or discrimination towards any. Both unit members and employers should be assured that similar complaints will be treated consistently. A breach of this duty occurs when a union's conduct towards a member of its unit is arbitrary, discriminatory, or in bad faith. *Vaca* refers us to *Humphrey v. Moore*, 375 U.S. 335, 84 S.Ct. 363, 11 L.Ed.2d 370 (1964), a case which is particularly apposite because it treats the question of fair representation when one employer absorbs the business (and seniority lists) of another, in a multi-employer bargaining unit represented by one union and covered by a collective bargaining agreement which specifically provides (as does this one) that the seniority status of all affected employees may be submitted to a Joint Arbitration Committee.

In *Humphrey*, certain of the employees of the absorbing employer (equivalent to Cassens' employees, here) sued the union, claiming breach of its duty after they were laid off as a result of the Joint Arbitration Committee's dovetailing of the two employers' seniority lists. In rejecting the claim of those plaintiffs, the Supreme Court relied upon a series of findings which the record in this case clearly fails to suggest. The court noted that the *Humphrey* plaintiffs had been made aware of the struggle for jobs simultaneously with the other employees concerned; had been given notice of the adjudication of their rights which would occur before the Joint Arbitration Com-

mittee, and had been given a fair hearing before that body on the issue. Moreover, it was noted that the collective bargaining agreement had empowered the arbitration committee to integrate the seniority lists on some rational basis and that such had indeed occurred; and finally that a union is not guilty of such a breach when it takes a good faith position contrary to the interests of some individuals represented, and that the position taken had indeed been a good faith one.

In this case, the struggle for jobs, the adjudication of their rights, and the very fact of a Joint Arbitration Committee hearing were all kept secret from these plaintiffs until their employment had terminated and they were not given a fair hearing before the decision-making body at any meaningful time. Their position was not even presented to the Joint Arbitration Committee and it did not, therefore, adjudicate their rights on any rational basis other than by omission. Moreover, the Joint Arbitration Committee's decision did not require the actions thereafter taken against plaintiffs by their union, in conduct of an all-male Bid. The local union's actions were based upon invidious sex discrimination and no other reason. The union agreed with the employer that women did not belong in the yard and further, it was the position of the chief union operative, Holsinger, that the job security of the women, because of their sex, was a matter of less weighty concern than that of men. Under authority of both *Vaca* and *Humphrey*, accordingly, plaintiffs have made their case, by more than a preponderance, that defendant union breached its duty of fair representation to them. It did so because of their sex.

The union has affirmatively claimed that plaintiffs failed to exhaust their administrative remedies through the contractual grievance procedure, or to pursue their internal union remedies for the alleged breach of a duty to represent. It is first noted that no internal union remedies have been shown

to exist, on the record. As to the claimed failure to exhaust the grievance procedure, the record reflects the Union Business Agent's undisputed flat refusal to represent the plaintiffs in their only meeting with Cassens' executives about their loss of jobs. Business Agent Deedy testified that he absolutely refused to become involved with such a meeting and that the women's position, as he claimed to understand it, had no merit. Of the grievances which plaintiff Jones filed, and which Union Agent Holsinger filed on plaintiffs' behalf (and President Lins referred to the wrong committee), there is no record of any union representation at the time of their final denial by Joint Arbitration Committees. The Sixth Circuit, moreover, is not one which requires exhaustion where a union member is unaware of his or her remedies. See *Geddes v. Chrysler,* 608 F.2d 261 (6th Cir. 1979). These plaintiffs, undisputedly, were not only unaware of their remedies but were deliberately deprived of notice of the arbitral adjudication of their rights upon which the union here relies. Other employees of both firms were present at the hearing of which plaintiffs were kept ignorant. Similarly, the union's claims that plaintiffs claims were barred by a grievance arbitration award, are also without merit under circumstances in which the award relied upon was obtained in secrecy from plaintiffs and without consideration of their interests.

The union's conduct towards these plaintiffs was, on the facts set out below, plainly sex-based discrimination; and evinced the clear intention of the union (from the first notice of Cassens' purchase of Square Deal) to prevent these women from utilizing their terminal or company seniority to complete for jobs against similarly situated men or even to complete as new applicants against new male candidates. Such conduct breaches a union's duty to fairly represent all bargaining unit members.

In *Farmer v. ARA Services, Inc.*, 660 F.2d 1096 (CA 6, 1981), this circuit had occasion to consider the claim of a group of female employees that their union had breached its duty of fair representation by participation in the employer's sexually discriminatory practices. The district court had found that the union had negotiated a contract which served to perpetuate discriminatory employer hiring and assignment patterns; had relegated the vast majority of female employees to a lower-paid part-time classification while males competed for higher-paid full-time jobs; and had negotiated lower rates for women than men, with lesser promotional opportunity. The Sixth Circuit, affirming, found that the union had breached its duty within the meaning of *Vaca v. Sipes, supra,* by failing to represent the interests of the women in negotiations, and that the conduct which resulted in the union's breach of its duty of fair representation also made out a Title VII violation. That court wrote, further, at 1104:

> The union is prohibited under Title VII from discriminating against any individual with regard to employment opportunities because of his or her...sex...or from causing or attempting to cause any employer to discriminate against an individual on the above-enumerated bases. *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 284-85, 96 S.Ct. 2574, 2580-81, 49 L.Ed.2d 493 (1976); *EEOC v. Detroit Edison*, 515 F.2d 301, 314 (6th Cir. 1975), vacated and remanded on other grounds, *sub. nom. Utility Workers Union v. EEOC*, 431 U.S. 951, 97 S.Ct. 2668, 53 L.Ed.2d 267 (1977). A labor organization can be held jointly and severally for acquiescing in the discriminatory practices of the employer. . .

* * * * * * * * * * *

> A union's role as a joint participant in the negotiation for a collective bargaining agreement has been found sufficient to render it liable under Title VII where the contractual provisions were discriminatory in operation or perpetuated the effects of past discrimination. *Robinson v. Lorillard,* 444 F.2d 791, 799 (4th Cir.), cert. dismissed 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 655 (1971); *Head v. Timken Roller Bearing Co.,* 486 F.2d 870, 875 (6th Cir. 1973); *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 348, n. 30, 97 S.Ct. 1843, 1861, 52 L.Ed.2d 396 (1977).
>
> In fact, it is almost axiomatic that a union's breach of a duty of fair representation also subjects it to liability under Title VII if the breach can be shown to be because of the complainant's race, color, religion, sex or national origin.

In *Mitchell v. Mid-Continent Spring Co.,* 583 F.2d (1978), this circuit considered the type of employer rationalization and conduct in which this union actively participated. It held that Title VII prohibits the use of popular stereotypes or even statistics to attribute general group characteristics to every individual member of a group. Accordingly, it was unlawful for the employer to assume, without testing, the only men could successfully perform the highest-paying jobs (which required lifting) and to relegate all females to a separate seniority list eligible only for the lowest-paid positions. Here, Holsinger was vocal in the offer of his stereotypical opinions as reasons for all that has happened to these women. He at least claimed to believe that they, because of their sex, were suited only for the "most pleasurable" jobs, could not survive a winter in the yard and were too emotional about their work. For those reasons he concurred, on all occasions, in the overtly sexist

requirements of management that no women work in the yard or, ultimately, in the Terminal.

In a claim of disparate treatment against an employer, plaintiffs under either Title VII or the Michigan Elliott-Larsen Civil rights Act must prove a *prima facie* case by a preponderance of all of the evidence, which "consists of facts sufficient to sustain the inference that the challenged action of the employer was motivated by impermissible considerations." *Mosby v. Webster College,* 563 F.2d 901 (8th Cir. 1977). The requirements of the *prima facie* case on a complaint of discriminatory nonselection, as stated by *McDonnell-Douglas Corporation v. Green,* 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668, (1973), are that the plaintiff show that (1) she belongs to a minority or statutorily protected group, (2) that she applied for and was qualified for a job for which the employer was seeking applicants, (3) that despite her qualifications she was rejected, and (4) that after her rejection he job remained open and the employer continued to seek applicants from persons with plaintiffs' qualifications. A *prima facie* case may also be made by "proof of actions taken by the employer from which we infer discriminatory animus because experience has proved that in the absence of any other explanation it is more likely than not that those acts were bottomed on impermissible considerations. *Furnco Construction Corp. v. Waters,* 438 U.S. 567, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978).

As the court stated in *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977):

> "Disparate treatment" such as is alleged in the present case is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin. *Proof of*

> *discriminatory motive is critical,* although it can in some situations be inferred from the mere facts of differences in treatment. . .

Here, there is no longer any dispute but that plaintiffs have made an overwhelming *prima facie* case of intentional discrimination or disparate treatment, under Title VII, against Cassens Transport. They have also made a *prima facie* case, by authority of *Farmer, supra,* against the defendant union.

Cassens did not want women in its terminal and the defendant union contrived that, despite its obligation to these women members, there would be none. Its course of conduct to the end constitutes violations of all of the Elliott-Larsen Civil Rights Act's prohibitions against labor union conduct.

It again must be noted, in evaluating plaintiffs' *prima facie* case under Elliott-Larsen, that Michigan courts have uniformly applied the federal substantive law of discrimination, and the federal allocation of burdens, in adjudicating cases filed under Elliott-Larsen. See *Michigan C.R.C. v. Chrysler,* 80 Mich. App. 368, 263 N.W.2d 376 (1977); *Clark v. Uniroyal, supra,* and *Northville Schools v. C.R.C., supra.*

Accordingly, inasmuch as plaintiffs have made a *prima facie* case that the union's breach of its duty to fairly represent them because of their sex constituted a violation of Title VII, those facts also constitute a violation of M.C.L.A. § 37.2204(a), as a failure to fairly and adequately represent members in the grievance process because of sex. Similarly, the above-outlined facts present a *prima facie* case of violation of M.C.L.A. § 37.2204(a) and (b), as (a) discrimination against a member because of sex, and (b) limiting, segregating, and classifying members; failing and refusing to refer for employment in a way which would deprive an individual of employment opportunity and which would adversely affect employment conditions because of sex.

Finally, a *prima facie* case was made under M.C.L.A. § 37.2204(c) that this union caused or attempted to cause an employer to violate this article. By foreclosing plaintiffs, because of their officeworker classifications, from participating in the Bid for Cassens' yardwork which the Arbitration Committee had ordered to be conducted by Master (Company) seniority, the defendant union made it inevitable that Cassens maintain an all-male yard. Moreover, by refusing even to advise plaintiffs that it was authorizing Cassens to hire casual yard worker/clericals after the bid; and by refusing to meet with plaintiffs and Cassens management on the subject of jobs, this defendant union attempted to cause an employer to violate M.C.L.A. § 37.2202(a) by failing or refusing to hire...because of sex.

When a court concludes that a Title VII (or Elliott-Larsen) plaintiff has proved a *prima facie* case if disparate treatment then the court must consider the defendant's explanation or justification for the presumptively discriminatory action. The type of defense that the defendant must then articulate depends upon the type of claim asserted by the plaintiff. In a disparate treatment case, the defendant must articulate "a legitimate nondiscriminatory reason" for its actions. *McDonnell-Douglas, supra*. Thereafter, the disparate treatment plaintiff may still prevail if she can, finally, establish by a preponderance of the evidence that the apparently nondiscriminatory rationale which was articulated by the defendant served only as a pretest for the in fact intentionally discriminatory acts or practices in question. *See, Board of Trustees of Keene St. College v. Sweeney*, 439 U.S. 24, 99 S.Ct.295, 58 L.Ed.2d 216 (1978); *Grano v. Department of Development of the City of Columbus*, 637 F.2d 1073 (6th Cir. 1980). The *Grano* court further noted, at footnote 7, 637, F.2d at 1081, that:

> Because discriminatory intent is so difficult to prove by direct evidence, it is incumbent upon a sen-

> sitive decision maker to analyze all of the surrounding facts and circumstances to see if discriminatory intent can reasonably be inferred. See *Arlington Heights v. Metropolitan Housing Development Co.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977).

On the basis of the settled law outlined above, and the findings of act set out below, this court finds that plaintiffs herein have no only made a *prima facie* case that defendants herein disparately treated and unlawfully discriminated against them because of their sex; but also that defendant union has failed to articulate legitimate nondiscriminatory reasons for its disparate treatment of plaintiffs; and that such reasons as defendant has suggested for its conduct are in fact pretextual for unlawful sex discrimination, in violation of the Title VII of the Civil Rights Act of 1964, as amended, and the Michigan Elliott-Larsen Civil Rights Act, M.C.L.A. § 37.2204.

Also, for the reasons explained below, the court specifically notes that the claim of defendant that its conduct toward plaintiffs was immunized from liability by the protection which Title VII affords a *bona fide* seniority system under § 703(h), and which Michigan law also affords at M.L.C.A. § 37.2211, is utterly without merit. Defendant not only was not required by any seniority system to discriminate against plaintiffs as it did; but in fact it discriminated in violation of the applicable contract seniority provisions.

In evaluating the legitimate nondiscriminatory business reasons articulated by defendant union for its conduct toward plaintiffs the court first notes that a preponderance of the evidence indicates that the excuse that it did not know of the plaintiffs' desires or availability for yardwork is pretextual. Defendant knew that the plaintiffs sought jobs, on any terms, and discriminatorily pressed for those which were available at Cassens only for males who were, as will be seen, no more

qualified than were plaintiffs, and who had no greater entitlement thereto than plaintiffs, as will be seen. Indeed, males with less terminal or company seniority were awarded the jobs on which plaintiffs were not permitted to bid. the union never advised plaintiffs of the availability of *new* jobs at Cassens, and even approved the hiring of new male clericals to be trained by the employer, while advising plaintiffs to seek training independently.

The defense next articulated by the union, that the Joint Arbitration Committee award required plaintiffs' preclusion from the Bid of August 1977, is also pretextual. The Arbitral decision requires only that seven employees from Square Deal be taken to Cassens' yard list, and that a new yard seniority list be prepared by "Master," or company seniority. If plaintiffs had been permitted to utilize their company seniority to bid and had not been limited to *classification* seniority as officeworkers and precluded from the bid as well, they all would have won jobs at Cassens and the plain language of the arbitration award would have been fully honored.

The next nondiscriminatory reason articulated is that the applicable collective bargaining agreements required that plaintiffs be prohibited from participation in the final Bid. That argument is clearly pretextual for invidious discrimination. First and foremost, the Merger Article of the Master Agreement, which is cited in the Arbitration Award itself (Article 5, p. 17), provides that "the terminal seniority lists of the two companies should be dovetailed so as to create a Master seniority list or lists *based upon total years of service with either company.*" There is no requirement of separation by division or classification as defendants here argue, except for the garage, when a merger occurs. Moreover, the nondiscrimination Article of the Master Agreement provides that, in those terminals where classification seniority obtains, terminal seniority shall prevail.

(Article 26, p. 57-8). Only the Garage supplement precludes use of competitive seniority against persons in another "division," The Arbitration Committee, moreover, is contractually authorized to supersede contractual terms and, insofar as those terms may be construed against plaintiffs' bidding rights, it appears to have done so in this case. The Arbitral proceeding and the ensuing Bid were kept secret from plaintiffs so that plaintiffs would have no opportunity to present their obviously good case for specific inclusion to the Arbitration Committee. Nevertheless, they were not excluded.

The argument that the office, which had been governed by the Master Freight agreement until 1971, had not accumulated Master Transport contract competitive seniority status, is equally flawed and pretextual. Drivers historically, up to the very date of the merger, were compensated either under the Master Transport or Master Freight agreements, depending upon what they hauled and how far, and continued nevertheless to accumulate unbroken Master Transport contract seniority over all the years of their employment. How, moreover, can the union argue that seniority under the Yardworker Supplement is fungible with seniority under both the Master Freight and Master Transport supplements, while seniority under the Office Supplement is fungible with none of the others? There is no justification.

We come next to the argument that consistent historical past practices at the Square Deal workplace had, essentially, constructed *de facto* separate and distinct bargaining units for the garage, drivers-yardmen, and office, and uniformly prohibited transfers or bidding with seniority from any one "unit" into another. This argument, of course, does not meet the question of why plaintiffs were not referred by the union to apply as new hires at Cassens. Defendant nevertheless argues strenuously that the uniform past practices have placed a gloss

on the contract language which must be honored here, and which is immunized despite any discriminatory impact, under § 703(h) of the Title VII, 42 U.S.C. § 2000e-2(h).

If such a *de facto* system were indeed established, this court must measure its *bona fides* and immunity in accordance with the standards applied to *de jure* systems; and these standards were recently examined by the Sixth Circuit Court of Appeals in *EEOC v. Ball Corporation*, 661 F.2d 531 (1981). That court wrote that, to qualify for 703(h) protection, the system must operate to "discourage all employees equally from transferring between seniority lists," and the policies in question must have been "negotiated and maintained free from any illegal purpose," citing *James v. Stockham Vales & Fitting Co.*, 559 F.2d 310, 352 (5th Cir. 1977) cert. denied 434 U.S. 1034 (1978). The system on which defendant relies herein, whether *de facto* or considered as *de jure* by adoption of their interpretation of their contracts, cannot qualify as *bona fide* under that standard. It does not operate uniformly, except against women, and it has not been maintained (if negotiated) free from unlawfully discriminatory purpose.

Defendant Local 299 and Square Deal had, by August of 1977, completely undermined the integrity of all applicable seniority provisions by their practices: which were to provide complete freedom of movement and opportunity for jobs in the various units and as to contract supplement applicability, for all employees except the women who were placed in the "office bargaining unit" and not permitted to move out, even temporarily. Although there were no requests to move into the female *unit*, the union freely provided office work for men in other units, who continued to be paid at their prior rates under other supplements. As mentioned above, no seniority list was posted anywhere, despite the uniform requirement in every supplement of posting. Moreover, *no company or ter-*

minal seniority lists existed: only classification lists, and a garage division list, were ever prepared or utilized. That practice was in patent violation of the nondiscrimination article of the Master Freight Agreement, which required that terminal seniority prevail over classification. The classification seniority lists, moreover, did not reflect the true location or duties of the persons listed thereon. Persons on the driver-yard list were assigned to work in the garage or office, at will; for lack of work or inability to work in their own "unit." Only plaintiffs were limited to the opportunities available within their classification and laid off for lack thereof.

In 1958, the merger driver-yard list at Square Deal was created because according to Wilson Holsinger, "we wanted to maintain that yard work for our Truckaway Drivers." The union petitioned for a merger of those two lists of men who worked under two different contract supplements, the same year that Holsinger organized the separate office unit. The record indicates clearly that this local union's overweening desire and purpose, in creation of its *de facto* "systems," and maintenance of "division" was to provide the best available job opportunities, regardless of "units," for the all-male drivers, and their male progeny, as described elsewhere in this opinion. Any job assignment or "bargaining unit" on the premises was available to drivers who could not drive for lack of work lack of equipment, ill health, old age, or for failure to meet regulatory qualifications.

The seniority list or "unit" in which an employee was listed, as frequently as not, bore no rational relation to the duties in which that employee was engaged, or the community of interest which he or she shared. The women were simply assigned to the office bargaining unit, while the men were free to pursue opportunities between and among all areas of the establishment, frequently with no alteration of their formal

designations whatsoever, and never with reduction of pay rate to the level of the women's contract. The men retained their formal designations on the most advantageous list available when working elsewhere, or even when their regular jobs would have been more appropriately included in the "office unit" if that unit were not in actuality the women's unit, the lowest paid, and the union with least overtime. The women's unit was the most disadvantaged in every respect. It did not even pretend to include all office personnel, but only the eight females among 20 office workers. Other male clericals throughout the terminal were carried routinely on other seniority lists. There were no incentives to move into this unit, but many to move out; and the women, despite innumerable requests, were never given that opportunity.

In examining defendants' separate units" argument the garage unit should be considered first because since 1955, nationally, the garage division/list has been contractually isolated. Article 80 of the National Master Transport agreement flatly prohibits bumping into and out of the garage division: and defendant union's administration of and past practice under the *bona fides* of its claim concerning its *de facto* isolation of the office, by past practice. The record reveals that the Local has not honored the prohibition against bumping into or out of the garage; although that is the *only contractual prohibition* against such bumping in any contract or supplement presented herein. That provision was treated, historically, as a mere formality.

The *highest paid* clerical employee in the Square Deal Terminal (a male) was employed in the garage division as a "parts clerk." His work flow was direct to the office accounting department. When plaintiff Ruane was assigned to work in the garage, however, as a cost-analysis clerk for heavy equipment, she too reported directly to the accounting department: but

she was paid at a lower rate and kept on the office "unit" seniority list. The garage division was also utilized, informally, as a temporary assignment for drivers idled by truck breakdowns, health problems, or lack of work. Both defendants readily admit that drivers under such circumstances would be paid hourly, under garage supplemental rates, and "work extra" in the garage unit until times got better. Holsinger named four drivers, who were worked "extra" in the garage, rather than laid off. Indeed, Holsinger testified that a "recognized exception to the rule against crossovers" was lack of work. That exception has never been made for any woman, however, and only women employees comprised the office unit. Women did not constitute all office or clerical workers; and no woman ever worked on the garage, yard, or drivers list or at those rates at either Square Deal or Cassens.

As noted above, the industry practice of maintaining separate driver and yardman lists was abolished at Square Deal at the request of the union in 1958, to provide continued status for nondriving "drivers." The consolidation of those nationally recognized separate and distinct communities of interest again belies the *bona fides* of defendants' claim of the integrity of its classification seniority system and the inevitability of its operation against plaintiffs in this instance. Indeed, the yard unit shares far greater community with the office unit than it does with drivers, although all three worked under different contract supplements. Yet the classification list of drivers was merged with the yard to provide them exactly the job security which was denied to plaintiffs herein not only in 1977, but on numerous occasions in the years prior. The yard and office were both paid at hourly rates; were both bound to the terminal; both reported to the chief dispatcher; were both concerned with load makeup; and both shared more similar benefit packages than did the drivers, who were paid by mileage under

the Truckaway contract, and performed their duties on the road. Nevertheless, Local 299 had no difficulty, whenever necessary, in paying a driver assigned to the yard pursuant to the yard contract supplement, and permitted the accrual of seniority in both classifications. It is notable also that three male clerical "yard inspectors" were employed at Square Deal from 1975 to 1977 and that those three men transferred to Cassens to work in that same classification. Plaintiff Harder had performed the yard inspector duty on some occasions and testified that the incumbents generated data which plaintiff Nickels then formalized in the office, for the processing of claims. The inspectors were never included in the office "unit," and plaintiffs (despite requests) were never permitted to claim those jobs. Aside from the distinctiveness of the office unit, Terminal Manager Jones suggested in his testimony that plaintiffs might lack the special qualifications required to perform the yard inspector job: the ability to identify damage on an automobile.

Both Holsinger for the union and Harold Jones for Cassens, strenuously attempted to justify the merger of driver and yardman classifications and the isolation of the office, with testimony that every yardman was required to have federal certification as a Truckaway driver, autohaul experience, and a chauffeur's license; and that no person was permitted to work in the yard who was physically unfit to drive, or unable to meet federal regulatory physical standards. Both witnesses later conceded the [sic] of that testimony. Square Deal hired persons into the yard with no prerequisites whatsoever, not even a driver's license. Holsinger conceded that he had trained the sons of several drivers who were hired into the yard with no skills at all, made Truckaway drivers of them, and that they thereafter bid for routes as drivers, annually, as everyone on the yard-driver list could do. Holsinger could train a yardman to drive in two weeks, to load cars onto a trailer in another

two weeks, and considered him a fully capable Truckaway driver after a year of occasional assistance. He gave this training to the sons of drivers Rowland, Holland, Boone, Woodard and others. Testing for the federal certification was then conducted internally, as well. If the yardman did not wish to drive routes, he was free to remain unqualified and remain in the yard at far higher compensation than any person in the office unit.

Among those who remained in the yard were also those drivers who had bid for and won an annual route, but who were not driving it for lack of shipments, or because their truck was broken or because they had become too sick or old to drive, or because they could not pass the federal physical examination. The yard furnished a place to work until one could drive again, or could retire. Holsinger himself acknowledged that, as a driver, he worked the yard and the garage after surgery rendered him too weak to drive; and that when he felt too weak and cold for any of the above, he sat in the dispatcher's office. The court credits plaintiffs' testimony that he was permitted to work in the office as well, as were others who remained on their other seniority lists, at higher rates of pay than the office "unit" members who had no transfer rights under any exigency.

The office "unit" included all women clericals, even if located in the garage, as plaintiff Ruane was as a garage costs-analysis clerk. The office unit did not, however, include the male garage parts clerk; or the male yard inspector clericals; or the dispatchers (all male, of whom there were three full-time and two part-time, located in the office); or the men who worked "in claims;" or the all-male assistants to the all-male supervisory staff; or the male payables clerk, Whitman, although it did include the female receivables clerk, Mazey.

The office unit was one into which no one requested entry,

from 1955 to 1977, although the office itself was utilized for temporary refuge from layoff for persons on other seniority lists and paid under other contracts, at will. There were *many* requests from plaintiffs to leave this disfavored unit through those years, however; and no one was ever granted, even when the alternatives were short workweeks, layoffs, and ultimately discharge.

The members of the office unit had the status of the lowest-paid union-represented people in the entire carhaul industry; Frances Jones, the most senior plaintiff, left Square Deal at an annual compensation of approximately $17,000 in 1977. She worked on payroll and was aware of yardmen who earned between $25,000 and $30,000. Their hourly rate was $0.50 higher than the office, and they had the opportunity to work substantial overtime.

Defendant makes much of the fact that the contract supplement applicable to the office seniority list included a guarantee of at least a 40-hour work week, and that plaintiffs were protected from layoffs in other classification lists by their standing on a separate office list.

The value of those "protections" was demonstrated in 1974, however, when Local 299 acknowledges that it waived the 40-hour guarantee for the office "unit" and plaintiffs all worked three days weekly, although the work week was never reduced in the yard, and no layoffs occurred in the yard, either. Holsinger admitted, also, that plaintiffs had enjoyed no advantage whatsoever insofar as layoffs were concerned, in the office unit; and that a driver or yardman could be laid off for several months of any given year and still earn more than any women in the office unit. Also, it must be reiterated, it is undisputed that the Local and Square Deal made work available in other units (including the office) for any male employee who might otherwise be laid off. The converse was never available for any member of the all-female office unit.

The layoff experience of all but the most recently hired plaintiffs was an unfortunate one. Undisputedly, in the early 1970s many of the women were laid off when no one else was, at all. Plaintiff Harder was hired in 1965 and laid off for one year from 1967 through 1968, for two months in 1971, and for six months in 1973 and 1974. In response to her many requests for work in the yard, and her expressed concerns about the support of her eight children, Local 299's Holsinger told her that she was "too emotional" about layoffs, and worried too much. He told her to be glad that she always had a good job, "the most pleasurable job" at Square Deal to come back to; and he advised her "as a personal friend" not to press her requests for yard work.

Plaintiff Ruane was hired in 1969, laid off for four months at Christmas in 1970, and for six months in 1974-1975. When Square Deal's (and later Cassens') Mr. Levinson recalled her in 1975 she had found a job with the City of Fraser, and bought a house. She asked Levinson if this was a permanent recall, because she had heavy responsibilities. Mr. Levinson told her she could count on him and not to worry: so she left the new job to return to Square Deal.

Plaintiff Nickels was hired in June 1973, laid off for two years, and was recalled in 1975, at which time she left a new job because she would be represented by a union at Square Deal.

All of the plaintiffs herein asked both defendants more than once prior to August of 1977, for either driving or yardwork or both, and all were rejected. Defendants have stipulated that defendant Cassens had received applications from women to drive prior to the merger, as well, but never tested one.

At Square Deal, plaintiff Frances Jones had been aware that women were drivers during World War II, but none since. She repeatedly asked to drive, over the years, because of the

high income earned thereby. She asked Square Deal supervisors Bigger, Boari, Schultz, Jones and Levinson, as well as the union's agents. Every response was negative, and every response referred to her sex. Plaintiffs Nickel, Ruane and Harder all testified that they asked for driving and/or yardwork and were laughed off; were told that they could not tie down cars or load a truck, could not bear the cold; or otherwise would not be seriously considered, basically because of presumptions applied to their sex.

Inasmuch as defendants appear to have articulated, ever so tentatively, some question as to whether the plaintiffs were *qualified* for any work other than the office jobs which they undisputedly did perform, their demonstrated capabilities and responsibilities must be examined.

All of the plaintiffs operated a variety of office machines. Plaintiff Jones prepared the Square Deal payrolls, *inter alia*, from 1955 through 1977. Others did billings and prepared damage claim reports on the basis of the jottings of the higher paid yard inspectors. As garage costs clerk, plaintiff Ruane had calculated and recorded the cost of operating each truck; and was responsible at another period for dispatching of sunroofed cars from Lansing to dealers along the routes of the drivers. That task required coordination of the drivers, the sunroof plant, the routes and the loads, all to minimize costs and by telephonic directives. Ms. Ruane was also responsible, at another period, for ascertaining and reporting to the Chrysler Corporation on the status and whereabouts of Chrysler automobiles listed on computer printouts for inquiry, called "delay tapes." At the dispatch window, various plaintiffs were made responsible for pulling the keys needed for each truckload of cars, and metering gasoline to drivers.

Nevertheless defendants suggest that none of the plaintiffs were qualified to perform any work other than that which was

taken from them. The vagueness of defendants' "qualifications" suggestions may be due to the fact that they never tested plaintiffs' qualifications for any job on the premises of either Square Deal or Cassens, or gave them the opportunity to perform any job which they were unable to perform. But further, the extremely minimal "qualifications" which the male incumbents have brought to those jobs, with apparent success, are so very glaring that it ill-behooves them to raise the subject at all.

When asked of the qualifications he required for the Dispatchers job, Mr. Jones, Cassens Terminal Manager, advised this court that the job was at the core of Terminal operations and required a man of independent judgment, a man capable of complex decision making, a man capable of handling money, a man capable of reprimanding a driver, etc. The court notes further that the job has been successfully filled by a series of former security guards and watchmen. No tests were given. No educational or experience requirement existed and no objective challenge has been raised to the claim of several plaintiffs that they can do the job: except for the stated requirement that the incumbent be a man.

As to the yard and driver jobs, defendants suggest not only enormous intellectual requirements, but that the physical demands of those jobs are so great as to be beyond the capacity of any female. Again, it is noted that plaintiffs' capacity to perform those jobs was never tested, despite innumerable requests therefore. It is also noted that defendants have never suggested ***which*** of the innumerable qualifications they list for these jobs (for the first time) the plaintiffs might fail to meet. The court, however, will accept without listing here the extraordinary catalogue of feats which defendants argue must be performed in the yard, and as a driver. That well may be. However, one learns from this record that one cannot be too

weak, too sick, too old and infirm, or too ignorant to perform these jobs, *so long as one is a man*. The plaintiffs appear to the layperson's eye to be far more physically fit than many of the drivers who moved into the yard, over the years, according to the testimony of defense witnesses. Plaintiff Harder pumped gas and cleaned a gas station among other jobs, when Square Deal closed. Plaintiff Murray had been a wartime riveter of air-plane doors, which she lifted in the course of that job, plaintiff Ruane (like all the others) could drive, change tires, and change batteries. In short, they were all at least as fit as the men with serious physical deficits and disabilities who held yard jobs. As to the intellectual qualifications, none beyond the ability to read and write existed, except for the jobs which plaintiffs held in the office. Plaintiffs were, on this record, as qualified as any male who obtained any position at either Square Deal or Cassens which they were denied.

Plaintiffs sought jobs at Cassens not only on the basis of their Square Deal seniority but as new hires, and were discriminatorily rejected on that level, as well. The union advised them that they were ineligible and not to apply, and refused to participate in the meeting which they held with management. After plaintiffs were terminated at Square Deal on August 26, and were rejected as new hires by Cassens President Shashek on August 29, 1977, and after absorbing all of Square Deal's male bidders, Cassens hired new male employees of no greater qualifications in substantial number, both into the office and the yard. The union entered a "90-day casual" agreement to permit those hires. The conduct of both defendants in proceeding to effectuate brand new hires as they rejected plaintiffs pleas was clearly intentional, disparate and sex-based discriminatory treatment.

The Arbitration Award and the Bid of August 1977 obviously contemplated the existence of a total of seventeen jobs in

Cassens' yard. But by September 29, 1977, Cassens had 21 men listed on its yard seniority list. Four of those had been hired aside from the bidders on September 2, 1977, and were totally new employees. Also, on August 26th the defendant Local Union had executed the casual agreement permitting the three young male "yard inspectors" to work without seniority listing for 90 days. So 24 persons worked in the Cassens' yard from September 2nd until November when the three casuals were hired into permanent status in the office. Two other male office clericals were newly hired into the office during October.

Defense witnesses testified uniformly that the upsurge in the autohaul business of Fall, 1977 was the greatest ever known to their experience, and did indeed require an immediate and substantial number of new hires at the Cassens Terminal, in all divisions. The discriminatory nature of their rejection of plaintiffs, under all of the above facts and circumstances, is overwhelmingly apparent.

On this record it is clear that defendant union treated plaintiffs disparately and less favorably than similarly situated males, and that its conduct constituted intentional invidious sex-based discrimination, under all of the well-settled law cited above. Plaintiffs were never even fairly afforded the protection which their Master contract seniority system afforded them. The union's conduct also constituted a clear breach of its duty to represent the women fairly as members of the Square Deal collective bargaining unit because of their sex.

The nondiscriminatory reasons articulated for defendant's otherwise discriminatory conduct are, by the preponderance of the evidence, pretextual. Although neither the seniority system nor the Arbitral decision required the discriminatory result which has obtained, to the extent that the injuries sustained by these plaintiffs may be attributed to defendant union's

de facto seniority system at Square Deal, that system was not *bona fide* within the meaning of § 703(h), 42 U.S.C. § 2000e-2(h) or Elliott-Larsen's comparable clause, M.C.L.A. § 37.2211. See *Taylor v. Mueller*, 660 F.2d 1116 (6th Cir. 1981). *Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977); *EEOC v. Ball, supra; James v. Stockham Valve, supra*, and *Terrell v. United States Pipe and Foundry*, 644 F.2d 1112 (5th Cir. 1981).

On the basis of the above-outlined findings of fact and conclusions of law, Judgment shall enter for plaintiffs against the defendant union.

/s/

ANNA DIGGS TAYLOR
U.S. District Judge

Dated: Sep 17, 1985

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

Nos. 85-1863/86-1104

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FRANCES JONES, BEVERLY HARDER, ELEANOR MURRAY, LINDA NICKEL, AND MARY RUANE,
Plaintiffs-Appellees,

v.

TRUCK DRIVERS LOCAL UNION NO. 299,
Defendant-Appellant.

ON APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed February 3, 1988

Before: MERRITT, WELLFORD and MILBURN, Circuit Judges.

WELLFORD, Circuit Judge, delivered the opinion of the court, in which MILBURN, Circuit Judge, joined. MERRITT, Circuit Judge, (pp. 17-41) delivered a separate opinion concurring in part and dissenting in part.

WELLFORD, Circuit Judge. Plaintiffs, five women, were office clerical workers at the Detroit terminal of the Square Deal Cartage Co., a company engaged in the transportation of automobiles to local dealerships. In August 1977, Square

Deal was purchased by Cassens Transport, Inc., another company in the same industry. Plaintiffs were not retained by Cassens after the takeover. Square Deal's driver, yard, and garage workers, all of whom are male, were retained by Cassens. The defendant, a local Teamsters union, represented the clerical as well as the driver, yard, and garage workers.

When they worked at Square Deal, the driver and yard workers had the same seniority list, but the garage and office workers each had a separate list. At the time of the merger, Cassens had drivers and yard workers on separate seniority lists represented by the same local union, but Cassens had no garage workers and had only nonunion office workers at its company headquarters in Illinois. In an effort to prevent any seniority and "bumping" problems as a result of the merger, the Central Southern Conference Automobile Transporters Joint Arbitration Committee recommended that Square Deal's drivers and yard workers be given an opportunity to bid on either driver or yard jobs at Cassens, and that Cassens should then prepare driver and yard workers seniority lists for the merged company, dovetailing the two companies' drivers and yard workers according to their respective years of service at either company. Office workers were not allowed to bid on non-office jobs, however, regardless of their accrued seniority. As a result, plaintiffs were left jobless by the merger.

In early 1978, four plaintiffs filed against Cassens unfair labor practice charges with the NLRB and Title VII sex discrimination charges with the EEOC. The EEOC issued right to sue notices against Cassens on January 22, 1979. None of the plaintiffs filed unfair labor practice or Title VII charges against the union with the NLRB or the EEOC. They settled their unfair labor practice case against Cassens.

On November 13, 1978, plaintiffs filed a complaint in the Circuit Court of Wayne County, Michigan. The original complaint contained three counts. The first, against Cassens and

the union, was based on the contention that their agreement "excluded Plaintiffs from . . . bidding rights . . . because they were women." This count recognized that bidding under the agreement was "in accordance with the seniority they had as employees of Square Deal Transport," but plaintiffs claimed the negotiation between defendants recognizing seniority rights under the Square Deal collective bargaining agreement violated "Plaintiffs' right to be free of employment discrimination because of their sex."

The next count concerned the employer only and claimed a refusal to hire plaintiffs as "yard" workers solely because of their sex. We are not concerned here with this charge. Count III was against the defendant union for failing "to represent Plaintiffs' interests in their negotiations" with Cassens with respect to bidding on jobs, and in refusing to represent plaintiffs by reason of their sex in their grievances that Cassens "wrongfully refused to hire" them for "yard" work in violation of "state and Federal law" with respect to equal employment. Plaintiffs later amended the complaint to add a Title VII complaint against Cassens and the union, which was found by this court to have no merit against the union based on procedural failures, and was accordingly dismissed. The amended complaint also alleged a pendent cause of action against both defendants under "Michigan's Civil Rights Act, M.C.L.A. § 37.2101 et seq."

We dismissed the plaintiffs' fair representation claim because plaintiffs failed to file their claim within the limitations period set out in *DelCostello v. Teamsters,* 462 U.S. 151 (1983). *See Jones v. Truck Drivers Local Union No. 299,* 748 F.2d 1083, 1086 (6th Cir. 1984). In our prior opinion, we set out, in part, the following facts:

> At the time of the merger, Cassens had drivers and yard workers on separate seniority lists represented by the same local union, but Cassens had no garage workers and had only non-union office workers at its company headquarters in Illinois. . . .

> The efforts of plaintiffs and their Union to persuade Cassens' management to retain plaintiffs in some capacity after the merger were unsuccessful. When plaintiffs became aware that Cassens might not retain them after the merger, plaintiffs met with Wilson Holsinger, a union business agent, who testified that he first learned in August 1977 that Cassens did not plan to retain the plaintiffs and that Cassens Vice President Shashek told him he did not want any Union employees in the office and believed the work in the computerized Cassens office in Illinois to be beyond plaintiffs' abilities. Holsinger filed a grievance on behalf of the office workers, but plaintiffs testified he discouraged them from applying to do yard work at the merged company even though workers on the old Square Deal combined driver and yard worker list could obtain "extra" work without seniority in the garage and garage workers could obtain temporary work in the yard or as drivers.

748 F.2d at 1085.

In remanding the case, we stated:

> In her opinion below, the District Judge focuses primarily on the federal claims and fails to make specific findings of fact and conclusions of law concerning the state claim under Michigan's Elliott-Larsen Act, Mich. Comp. Laws Ann. § 37.2204(a)-(d). We are unable to determine on review which particular sections of that Act are at issue and what particular Union conduct the District Judge found to violate the Act. We are unable to determine from the opinion below whether the District Judge found that the Union's actions constituted illegal exclusion or expulsion from membership, classification or segregation of membership, efforts to cause or attempt to cause Cassens to vio-

late the Elliott-Larsen Act, failure to adequately represent plaintiffs in the grievance process, or a combination of some or all of these prohibited activities.

748 F.2d at 1086-87.

The district court amended her prior decision upon the remand by adding the following language:

> Cassens did not want women in its terminal and the defendant union contrived that, despite its obligation to these women members, there would be none. Its course of conduct to the end constitutes violations of all the Elliott-Larsen Civil Rights Act's prohibitions against labor union conduct.
>
> It again must be noted, in evaluating plaintiffs' *prima facie* case under Elliott-Larsen, that Michigan courts have uniformly applied the federal substantive law of discrimination, and the federal allocation of burdens, in adjudicating cases filed under Elliott-Larsen.
>
> Accordingly, inasmuch as plaintiffs have made a *prima facie* case that the *union's breach of its duty to fairly represent them because of their sex constituted a violation of Title VII, those facts also constitute a violation of M.C.L.A. § 37.2204(a), as a failure to fairly and adequately represent members* in the grievance process because of sex. Similarly, the above-outlined facts present a *prima facie* case of violation of M.C.L.A. § 37.2204(a) and (b), as (a) discrimination against a member because of sex, and (b) limiting, segregating, and classifying members; failing and refusing to refer for employment in a way which would deprive an individual of employment opportunity and which would adversely affect employment conditions because of sex.
>
> Finally, a *prima facie* case was made under M.C.L.A. § 37.2204(c) that this union caused or

> attempted to cause an employer to violate this article. By foreclosing plaintiffs, *because of their office-worker classification,* from participating in the Bid for Cassens' yardwork which the Arbitration Committee had ordered to be conducted by Master (Company) seniority, the defendant union made it inevitable that Cassens maintain an all-male yard. Moreover, by refusing even to advise plaintiffs that it was authorizing Cassens to hire casual yard worker/clericals after the bid, and by refusing to meet with plaintiffs and Cassens management on the subject of jobs, this defendant union attempted to cause an employer to violate M.C.L.A. § 37.2202(a) by failing or refusing to hire . . . because of sex.

Jones v. Cassens Transport, 617 F. Supp. 869, 885 (E.D. Mich. 1985) (emphasis added, citations omitted).

Section 204 of the Elliott-Larsen Act, M.C.L.A. § 37.2204, provides as follows:

> **37.2204. Labor organizations; prohibited acts**
>
> Sec. 204. A labor organization shall not:
>
> (a) Exclude or expel from membership, or otherwise discriminate against, a member or applicant for membership because of religion, race, color, national origin, age, sex, height, weight, or marital status.
>
> (b) Limit, segregate, or classify membership or applicants for membership, or classify or fail or refuse to refer for employment an individual in a way which would deprive or tend to deprive that individual of an employment opportunity, or which would limit an employment opportunity, or which would adversely affect wages, hours, or employment conditions, or otherwise adversely affect the status of an employee or an applicant for employment,

> because of religion, race, color, national origin, age, sex, height, weight, or marital status.
>
> (c) Cause or attempt to cause an employer to violate this article.
>
> (d) Fail to fairly and adequately represent a member in a grievance process because of religion, race, color, national origin, age, sex, height, weight, or marital status.

The district court refers to the union's failure fairly to represent the female plaintiffs under § 37.2204[1] without referring to § 37.2211 which recognizes that it is not an unlawful employment practice under the Act to take employment actions "pursuant to a bona fide seniority or merit system." Section 37.2211 tracks the language of § 703(h) of Title VII, 42 U.S.C. § 2000e-(h), which has been held to mean that

> although a seniority system tends to perpetuate effects of pre-Act discrimination resulting in one group having greater seniority than another, Title VII does not outlaw, destroy or water down an otherwise neutral, legitimate seniority system or the vested seniority rights attendant thereto simply because the employer had engaged in discriminatory hiring or promotion prior to the passage of the Act.

Detroit Police Officers Ass'n v. Young, 446 F. Supp. 979, 1008 (E.D. Mich. 1978) (citing *Teamsters v. United States,* 431 U.S. 324 (1977)), *rev'd on other grounds,* 608 F.2d 671 (6th Cir. 1979), *cert. denied,* 452 U.S. 938 (1981).

The district court has made the finding of liability against defendant union in the context of its "duty to represent" the plaintiffs under M.C.L.A. § 37.2204.

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[1]While the district court refers to § 37.2204(a), (b), and (c), she uses the words of subsection (d) which is analogous to the federal § 301 charge which was dismissed.

The district court opinion makes reference to breach of duty to represent fairly "in the grievance process because of sex." In the original complaint itself, plaintiffs recognized that the bidding for positions after the merger was in accord with past seniority rights while employed at Square Deal Transport, but they maintained this effectuated sex discrimination. This contention would seem to run afoul of the Michigan § 211 provision recognizing a legitimate seniority system. *See Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *Wygant v. Jackson Board of Education*, _ U.S. _, 106 S. Ct. 1842 (1986). The district court failed to take this into account and held erroneously that the union breached its duty to represent fairly and adequately by reason of sex discrimination simply by failing to insist that the collective bargaining agreement be carried out so as to permit plaintiffs to transfer into another bargaining unit.

The claim of sex discrimination against a union under the Elliott-Larsen Act is akin to the claim of a union's failure "fairly and adequately [to] represent a member . . . because of the member's handicap" as set out in M.C.L.A. § 37.1204(d).[2] The Michigan Handicappers' Act, above noted, precludes, in effect, discrimination by reason of an employee's handicap instead of the employee's sex, as is involved in the instant case. This duty not to fail to represent fairly under the Michigan Handicappers' Act was held by this court recently not to be an imposed new duty on a union "not already clearly present under existing federal labor law." *Maynard v. Revere Copper Products, Inc.*, 773 F.2d 733, 735 (6th Cir. 1985). We stated further in *Maynard*:

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[2]The language of this section tracks the language of the Elliott-Larsen Act (M.C.L.A. § 37.2204):

> A labor organization shall not
>
> . . .
>
> Fail to fairly and adequately represent a member . . . because of . . . sex.

> The doctrine of preemption is firmly established in labor law. The duty of fair representation relates to an area of labor law which has been so fully occupied by Congress as to foreclose state regulation. Whether union conduct constitutes a breach of the duty of fair representation is a question of federal law. *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 299, 91 S. Ct. 1909, 1924, 29 L.Ed.2d 473 (1971). The fact that an action for failure to fairly represent a member may be brought in a state court, see *Humphrey v. Moore*, 375 U.S. 335, 84 S. Ct. 363, 11 L.Ed.2d 370 (1964), is beside the point. Regardless of the forum in which the claim is presented, the case is controlled by federal law. *Id.* at 343-44, 84 S. Ct. at 368-69.

773 F.2d at 735. The underlying collective bargaining agreement in this case, furthermore, contained an express non-discrimination section dealing with sex as well as other types of discrimination. The alleged underlying discriminatory actions in this case, then, clearly relate to a breach of the collective bargaining agreement and to the failure of the union fairly to represent the plaintiffs because of their sex. Interpretation of the contract was necessary to determine seniority and bargaining unit rights in this case. Interpretation of the contract was also inexorably intertwined in the union's delicate problem of representing different bargaining units in the merger of the operations after the Cassens' acquisition and merger. Interpretation and enforcement of the collective bargaining agreement is essentially and primarily a matter of federal labor law.

We believe that *Maynard v. Revere Copper Products, Inc.*, 773 F.2d 733 (6th Cir. 1985), is controlling here. The plaintiffs' action under state law is essentially the same as their claims under federal law against the union. They do not claim to be excluded from union membership, nor can they claim that seniority under the collective bargaining agreement was

not followed. The employer and the union negotiated this collective bargaining agreement, and there is nothing in the record that plaintiffs opposed adoption of the collective bargaining agreement when consummated by the employer and the union. No grievance was filed by plaintiffs prior to the effectuation of the merger. There were no new rights created under the Michigan law nor any new duty imposed upon the union not already present under existing federal law. As in *Maynard,* essentially the same claim for failure to represent was previously found to be time barred under federal law which applied. This kind of claim, a failure to represent *fairly,* is essentially a matter of federal law, "an area of labor law which has been so fully occupied by Congress" as to foreclose or to preempt state regulation. *Id.* at 735.

Also, as found in *Maynard,* it would in this case, whose facts are analogous in many respects to the facts in *Maynard,* "be anomalous to hold that the same claim survived the defense of limitations [under *DelCostello, supra*] because it was stated in terms of the state law designed to protect . . . workers from discrimination." *Id.* at 735. We see no essential difference between an underlying claim of handicap discrimination and a claim of sex discrimination as a basis for assertion of a failure to represent fairly, as a matter of essential state or local interest. Such a charge is not essentially different from a claim of unfair labor practice by reason of some other kind of invidious discrimination on the part of a union or on the part of an employer. Unfair representation, then, is unfair representation whether by reason of sex discrimination, handicap discrimination, or a willful breach of responsibility to carry out clear terms of a collective bargaining agreement for the benefit of union members and employees. The claims of plaintiffs under these circumstances related to a failure fairly to represent or in respect to the collective bargaining agreement, must be deemed to be foreclosed and preempted. *See Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202 (1985).

The district court's underlying rationale for its finding of a failure of fair representation by reason of sex was tied to that court's assumptions and conclusions concerning the force and effect of the collective bargaining agreement with respect to separate bargaining unit seniority.

In our view the district court erred in its construction of the seniority system applicable to the Square Deal/Cassens merger. To understand the operation of that system, it is necessary to understand each of its component parts. The first level of seniority provided for office workers by the agreement is "terminal seniority." Terminal seniority allows an office worker to bid for jobs available *in his bargaining unit* within a particular terminal. *See* National Master Automobile Transporters Agreement, Michigan Office Workers Supplement, Article 38, 2 ("NMATA Supplement"). It is important to note that *since office workers were restricted to a separate bargaining unit,* terminal seniority could only be used to secure office work. "Company seniority" reflected an employee's seniority within the entire company rather than just a particular jobsite. In the event of layoffs at a particular jobsite, a senior employee could exercise seniority rights to gain employment at a different office, at the expense of the junior employee holding that other job. As with terminal seniority, however, office workers exercising company seniority could only bump other *office* workers; they could not "cross-bump" union workers from the non-office bargaining units. *See* NMATA Supplement, Article 39, 3.

Article 5, Section 1 of the National Master Automobile Transporters Agreement provides a procedure to combine seniority lists in the event of a merger. This section mandates "dovetailing" of the terminal seniority lists of the two merging entities. The district court read this section to require that one list be prepared for each company, with that list ranking employees by their seniority without regard to their bargaining unit. The effect would be to abolish the historic segregation of lists by job classification. Under this reading,

an office worker with 15 years seniority could cross-bump a non-office worker with less seniority. Since this clearly would not be possible in the absence of a merger because of the clear language of Article 39, §§ 2-3 of the NMATA Supplement, the district court must have found that the merger provision contemplated lumping all employees into one group regardless of their former bargaining unit with the effect of allowing cross-bumping.

We find no support for the district court's construction of the merger provision. The provision itself contemplates that multiple lists could result from dovetailing. The merger provision directs that the office workers' list from one company be merged with the office workers' list from the other company—and that other bargaining unit lists be combined in the same way—in order to maintain the segregation of workers by their bargaining unit or job description. The contract does not envision that the event of a merger will allow office employees to do what they could not otherwise: cross-bump less senior employees from different bargaining units.

The district court relied on a number of instances in which cross-bumping was allowed—including the driver/yard "special bid" — to determine that cross-bumping was not prohibited. Whatever the evidence on bumping between other bargaining units, it is clear that the office unit was never allowed to bump into non-office jobs. Custom and practice therefore reinforce the clear language of the contract provision in prohibiting office workers from cross-bumping, and the office workers had no right to bid for non-office jobs either before or after the merger.

Thus, we find the district court's analysis of the union's seniority defense to be erroneous, and we consider this error directly to affect the union's ultimate liability. The defense interposed by a bona fide seniority system would allow differences in compensation or terms, conditions or privileges of

employment arising from the operation of such a seniority system. The disparity claimed here, however, is in the representation afforded female office workers by the union. The contract provisions required the union to deal with female office workers in a separate bargaining unit with no right to transfer seniority. The question is whether the defense of seniority within separate bargaining units without cross-bumping is a complete defense in this case to the substantive state law claims of plaintiffs.

The seniority defense involves labor contract interpretation and raises the specter of federal preemption under § 301 of the Labor Management Relations Act. To the extent, then, that the district court could hold the union to have been liable for failure fairly to represent plaintiffs by reason of the effect of the agreement concerning non-transferability of bargaining unit seniority, it is erroneous despite the adverse impact upon plaintiffs as females.

In summary, we construe the district court's order and judgment essentially to have found the defendant union liable for its failure to represent the plaintiffs fairly. To the extent the district court imposed this liability by reason of the union's adherence to the terms of the collective bargaining agreement, neutral on its face, with respect to seniority recognition and bidding procedures, this ruling is precluded by virtue of Michigan law (§ 37.2211), which respects the legitimacy of seniority. Apart from the union's right to rely in good faith on the collective bargaining agreement seniority provisions, plaintiffs' claim against the union for failure to represent fairly under the contract is preempted by federal law, which governs the interpretation of the collective bargaining agreement. The district court's finding of unfair representation based upon sex discrimination also triggers interpretation of the collective bargaining agreement's antidiscrimination clause, again a matter of federal labor law preemption. *See Maynard v. Revere Copper Products, Inc.*, 773 F.2d 733 (6th Cir. 1985). The state law claim with respect

to failure to represent fairly, akin to the federal claim of that same nature, is barred by the statute of limitations. That the claim here is based on sex discrimination rather than handicap discrimination is neither significant nor controlling. We limit our discussion of the preemption question to the subject of claimed unfair representation.

> Our analysis must focus, then, on whether the [state cause of action] confers nonnegotiable state-law rights on employers or employees independent of any right established by contract, or, instead, whether evaluation of the [state] claim is inextricably intertwined with consideration of the terms of the labor contract.

Allis-Chalmers, 471 U.S. at 213.

Our concern in this case concerns the preemptive force of substantive federal law in respect to claims inextricably intertwined with the interpretation and construction of a collective bargaining agreement. We are not concerned with the question of jurisdiction between the NLRB and the federal courts. *Vaca v. Sipes*, 386 U.S. 171 (1967), cited by the dissent, is therefore not relevant here.

What has been set out precludes liability against the union through implementation of the merger under the terms of the existing collective bargaining agreement. To the extent that plaintiffs make a claim of the union's post-merger discrimination by way of intentionally excluding or participating in intentional exclusion of females from the other bargaining units, apart from any effort to carry over office seniority to "yard" work or to driving, they may have stated and proved a state cause of action independent of the foreclosed and preempted claims. A remand for purposes of considering that limited area of liability and potential damages in the case of qualified plaintiffs who sought such positions is accordingly directed. That claim, a direct claim of sex discrimination against the union, apart from unfair representa-

tion under the collective bargaining agreement, remains for further determination.

When the district court reheard this case after our remand order, it did not recompute the damages allocable to the union but merely reinstated the judgment entered in the earlier proceeding. Although the plaintiffs had settled with the co-defendant employer in the interceding period, the district court saw no need to recompute the damages when an appeal was pending on liability. Thus the earlier judgment was reaffirmed despite the plaintiffs' concession that the union was entitled to a set-off to reflect the Cassens settlement. *See* Record on Motion to Affirm or Reinstate Judgment at 21.

The record on the motion to reinstate the judgment reflects genuine confusion as to the application of a set-off in favor of the union, the availability of prejudgment interest, and the appropriate interest rate for interest awards. As a result, regardless of our decision on preemption, we would be required to vacate the present damages award and remand for detailed findings of fact and conclusions of law on the intricate damages issues presented by this case.

When recomputing the damages, if any, attributable to the union's misconduct, the district court may not allow damages for lost wages which resulted from the plaintiffs' inability to use their office seniority to gain non-office jobs. The limitation on cross-bumping for office employees was established by the contract, not union misconduct. If the plaintiffs would have lost their jobs or failed to obtain new ones with Cassens even if the union were not guilty of claimed discrimination by way of excluding females entirely after the merger, the plaintiffs' recovery should be limited to compensation for the union's discrimination, if any, only in that respect. In other words, the union cannot be held liable for consequences it could not have prevented given the limitations imposed by the contract as we have construed it. Claims of those plaintiffs who may have sought other positions with Cassens (apart

from seniority transfer) after the merger, then, may be considered upon remand in respect to liability and damages against the union.

We do not disagree with the dissent in respect to a conclusion that plaintiffs may, on remand, establish entitlement to an award for damages for sexually discriminatory exclusion from bargaining units *after* the merger (not based on a claimed violation of the collective bargaining agreement).

Accordingly, the case is REMANDED to the district court for the sole purpose of determining liability and damages, if any, consistent with this opinion.

MERRITT, Circuit Judge, concurring in part and dissenting in part. In my judgment the majority does not adequately deal with the complex issues raised in this preemption case, and it applies an overbroad preemption doctrine to deny the plaintiffs their rights under state law. Moreover, I do not understand from the majority opinion what part of the plaintiffs' claims the majority is remanding for reconsideration or precisely what it expects the District Court to do on remand. I do not understand what is to be done because the Court does not make clear what part of the plaintiffs' sex discrimination claims are preempted and what part are not preempted.

Defendant Local 299 appeals the District Court's $365,334.23 judgment in favor of female union members who brought suit under Michigan's Elliott-Larsen Civil Rights Act for sex discrimination. The union's appeal challenges the decision of the District Court on four grounds, none of which are adequately discussed in the Court's opinion. First, the union argues that the District Court abused its discretion by retaining jurisdiction over the pendent state law claims after the federal claims were dismissed.[1] The

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[1]The pendent jurisdiction issue is easily disposed of in this case. Pendent jurisdiction in the federal courts is governed by *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966), and its progeny. Since pendent jurisdiction is a doctrine of discretion and not of substantive right, the plaintiff must show that the federal court has the *power* to hear the state law claim and that it is *prudent* to do so. *Id.* at 725-26. The justification for pendent jurisdiction "lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims, even though bound to apply state law to them." *Id.* at 726 (citation omitted). Appellate review of a district court's decision to exercise pendent jurisdiction is governed by an abuse of discretion standard. *Id.* at 728.

In deciding whether pendent jurisdiction was proper after the remand order from this Court, the District Judge noted that the *Gibbs*

union's second argument is that the District Court misapplied the Elliott-Larsen Act. The union's next claim is that federal labor law preempts Michigan's Elliott-Larsen Act in this case. And finally, the union claims that the District Court erred by reaffirming its prior judgment instead of instituting a new judgment which would incorporate plaintiffs' settlement with Cassens Transport.

I. *Factual Background and Proceedings Below*

Plaintiffs, five women, were office clerical workers at the Detroit terminal of the Square Deal Cartage Co., a company engaged in the transportation of new automobiles to local dealerships. In August 1977, Square Deal was purchased by Cassens Transport, Inc., another company in the same industry. Plaintiffs were not retained by Cassens after the takeover. Square Deal's driver, yard, and garage workers, all of whom are male, were retained by Cassens. The defendant, a local Teamsters union, represented the clerical as well as the driver, yard, and garage workers.

When they worked at Square Deal, the driver and yard workers had the same seniority list, but the garage and office workers each had a separate list. At the time of the merger, Cassens had drivers and yard workers on separate seniority lists represented by the same local union, but Cassens had no garage workers and had only non-union office workers at its company headquarters in Illinois. In an effort to prevent

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analysis was colored by the protracted nature of this litigation, and by the fact that a full trial on the merits had already been held. *Jones*, 617 F. Supp. at 873. We agree that the history of this litigation supports an exercise of pendent jurisdiction in order to promote "judicial economy, fairness and convenience to litigants" as suggested by *Gibbs*. Accordingly, the District Court did not abuse its discretion by maintaining jurisdiction over the state law claims on remand after the federal claims were dismissed on appeal.

any seniority and "bumping" problems as a result of the merger, the Central Southern Conference Automobile Transporters Joint Arbitration Committee recommended that Square Deal's drivers and yard workers be given an opportunity to bid on either driver or yard jobs at Cassens, and that Cassens should then prepare driver and yard workers seniority lists for the merged company, dovetailing the two companies' drivers and yard workers according to their respective years of service at either company. Office workers were not allowed to bid on non-office jobs, however, regardless of their accrued seniority. As a result, plaintiffs were left jobless by the merger.

In early 1978, four plaintiffs filed against Cassens unfair labor practice charges with the NLRB and Title VII sex discrimination charges with the EEOC. The EEOC issued right to sue notices against Cassens on January 22, 1979. None of the plaintiffs filed unfair labor practice or Title VII charges against the union with the NLRB or the EEOC. They settled their unfair labor practice case against Cassens.

On November 13, 1978, plaintiffs filed a complaint in the Circuit Court of Wayne County, Michigan, alleging a state claim and a federal claim. They alleged that Cassens and the Union had violated Michigan's Elliott-Larsen Civil Rights Act, Mich. Comp. Laws Ann. § 37.2101 *et seq.* (1983), and that the union had violated Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, by breaching its duty of fair representation. The union removed the case on November 30, 1978, to the United States District Court for the Eastern District of Michigan. Plaintiffs then filed an amended complaint in which they alleged that Cassens and the Union had violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*

The District Judge held that both Cassens and the union had violated Title VII and the Elliott-Larsen Civil Rights Act and that the union had breached its duty of fair representa-

tion. After the District Court issued its damages award in the amount of $365,334.23, both defendants appealed to this Court. Cassens settled its case and dismissed its appeal. *Jones v. Cassens Transport,* 538 F. Supp. 929 (E.D. Mich. 1982).

After the Cassens settlement, proceedings against the union continued. On appeal, a panel of this Circuit dismissed the federal claims against the union. *See Jones v. Truck Drivers Local Union No. 299,* 748 F.2d 1083 (6th Cir. 1984). The Title VII claim was dismissed because of plaintiffs' failure to file an EEOC charge against the union, and the unfair representation claim was dismissed on the statute of limitations as established by *DelCostello v. Teamsters,* 462 U.S. 151 (1983). This Court remanded the case to the District Judge for additional findings of fact and conclusions of law on the remaining Elliott-Larsen Act claims. On remand, the District Judge considered additional briefs on the state law cause of action but did not substantially alter her first opinion. The union was again found liable for sex discrimination under the state statute. *Jones v. Cassens Transport,* 617 F. Supp. 869 (E.D. Mich. 1985).

The factual findings made by the District Court fall into two broad categories. The first relates to the District Court's construction of the seniority provisions of the collective bargaining agreement and its conclusion that the plaintiffs were entitled to continued employment with Cassens after the merger. The union argued as a *defense* that the difference in treatment of the plaintiffs as a group resulted from the neutral application of a bona fide seniority system based on custom and practice in the industry, and not from gender-based discrimination. The District Court, however, found this argument "to be utterly without merit" based on its own interpretation of the seniority provisions. *Jones,* 617 F. Supp. at 886. "Defendant not only was not required by any seniority system to discriminate against plaintiffs as it did; but in fact it discriminated in violation of the applicable contract seniority provisions." *Id.* The Court also took issue with the use

of separate seniority lists: "[t]hey utilized one list which was unique in treating two different all-male classifications as one while excluding a third (female) classification from that benefit; and they did so in violation of every applicable contract clause and of the arbitral decision. . . ." *Id.* at 876.

The second group of factual findings concerns other, non-contractual evidence of discrimination. The District Court found that the union engaged in a pattern of discriminatory conduct: repeatedly refusing to negotiate with Cassens for the plaintiffs' jobs, *id.* at 877-82; making misleading statements to the female members about their rights and the zeal with which the union was protecting those rights, *id.* at 878, 882; failing to inform or consult the female members about the effects of the merger or seniority grievance procedures, *id.* at 877-78; and using segregated seniority lists to prevent women from competing with men for existing or new positions, *id.* at 883. Based on these facts, the Court further found as follows:

> The credible facts of record here clearly demonstrate that, in competition for the better jobs historically[,] and for any jobs at the end, the plaintiff women were the victims of intentionally disparate and less favorable treatment than the similarly situated male employees at Square Deal whom this union represented. Both the union and employer intentionally discriminated against them, albeit for somewhat different reasons. Employer management, in the person of Messrs. Jones and Shashek, had a sex-based animus against female workers on the premises. The union pandered to that animus in its zeal to represent its male members (and even male outside applicants for jobs) at the expense of the women, whom it considered to be no more than an auxilary [sic] to the real bargaining unit, and a source of unobligated dues for twenty years.

* * *

> The local union's actions were based upon invidious sex discrimination and no other reason. The union agreed with the employer that women did not belong in the yard and further, it was the position of the chief union operative, Holsinger, that the job security of the women, because of their sex, was a matter of less weighty concern than that of men.

Id. at 882-83. With these facts in mind, we turn to the legal issues raised by this case.

II. *The Elliott-Larsen Act*

The union's first claim is that the District Court misapplied Michigan's Elliott-Larsen Act, Mich. Comp. Laws Ann. §§ 37.2101-.2804 (1985). The District Court found the union liable for violating the specific terms of § 37.2204(a)-(d), which deals with discrimination by a union against its membership.[2] Under the burden-shifting analysis incorpo-

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[2]Section 204 of the Elliott-Larsen Act, Mich. Comp. Laws Ann. § 37.2204, provides:

> **37.2204. Labor organizations; prohibited acts**
>
> Sec. 204. A labor organization shall not:
>
> (a) Exclude or expel from membership, or otherwise discriminate against, a member or applicant for membership because of religion, race, color, national origin, age, sex, height, weight, or marital status.
>
> (b) Limit, segregate, or classify membership or applicants for membership, or classify or fail or refuse to refer for employment an individual in a way which would deprive or tend to deprive that individual of an employment opportunity, or which would limit an employment opportunity, or which would adversely affect wages, hours, or employment conditions, or otherwise adversely affect the status of an employee or an applicant for employment, because of religion, race,

rated into the Elliott-Larsen Act from Title VII, the District Court found that the plaintiffs proved a prima facie case of discrimination which the defendant did not rebut by offering nonpretextual, nondiscriminatory reasons. The union claims that § 211 of the Elliott-Larsen Act, which exempts disparate treatment that results from a bona fide seniority plan, provides a defense to plaintiffs' prima facie case.

It is clear from the record that plaintiffs have indeed shown a prima facie case of discrimination by the union. The attitudes exhibited by the union officials reveal a pervasive gender bias that manifested itself in an unwillingness to represent the female office workers. The second category of factual findings which were described above amply illustrates this discrimination. I find the District Court's factual finding of discriminatory animus on the part of the union to be supported by the testimony and circumstantial evidence in the case.

Whether the union's seniority defense is sufficient to rebut the plaintiffs' prima facie case is a more difficult question. The union contended that the plaintiffs lost their jobs through the neutral operation of the seniority system, not discrimination by the union. The District Court, however, undertook its own examination of the seniority provision and determined that the plaintiffs would not have lost their jobs under the seniority system *if* it had been properly applied; therefore, the union could not claim the seniority system as a defense.

In my view the District Court erred in its construction of the seniority system applicable to the Square Deal/Cassens

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color, national origin, age, sex, height, weight, or marital status.

(c) Cause or attempt to cause an employer to violate this article.

(d) Fail to fairly and adequately represent a member in a grievance process because of religion, race, color, national origin, age, sex, height, weight, or marital status.

merger. To understand the operation of that system it is necessary to understand each of its component parts. The first level of seniority provided for office workers by the agreement is "terminal seniority." Terminal seniority allows an office worker to bid for jobs available *in his or her bargaining unit* within a particular terminal. *See* National Master Automobile Transporters Agreement, Michigan Office Workers Supplement, Article 38, § 2 ("NMATA Supplement"). It is important to note that since office workers were restricted to a separate bargaining unit, terminal seniority could only be used to secure office work. "Company seniority" reflected an employee's seniority within the entire company, rather than within just a particular jobsite. In the event of layoffs at a particular jobsite, a senior employee could exercise seniority rights to gain employment at a different office, at the expense of the junior employee holding that other job. As with terminal seniority, however, office workers exercising company seniority could only bump other office workers; they could not "cross-bump" junior workers from the non-office bargaining units. *See* NMATA Supplement, Article 39, § 3.

Article 5, § 1 of the National Master Automobile Transporters Agreement provides a procedure to combine seniority lists in the event of a merger. This section mandates "dovetailing" of the terminal seniority lists of the two merging entities. The District Court read this section to require that one list be prepared for each company, with that list ranking employees by their seniority without regard to their bargaining unit. The effect would be to abolish the historic segregation of lists by job classification. Under this reading, an office worker with 15 years seniority could cross-bump a non-office worker with less seniority. Since this clearly would not be possible in the absence of a merger because of the clear language of Article 39, §§ 2-3 of the NMATA Supplement, the District Court must have found that the merger provision contemplated lumping all employees into one group regardless of their former bargaining unit with the effect of allowing cross-bumping.

The District Court erred in its construction of the merger provision. The provision itself contemplates that multiple lists could result from dovetailing. The merger provision directs that the office workers list from one company be merged with the office workers list from the other company —and that other bargaining unit lists be combined in the same way—in order to maintain the segregation of workers by their bargaining unit or job description. The contract does not envision that the event of a merger will allow office employees to do what they could not do otherwise: cross-bump less senior employees from different bargaining units.

The District Court relied on a number of instances in which cross-bumping was allowed—including the driver/yard "special bid"—to determine that cross-bumping was not prohibited. Whatever the evidence on bumping between other bargaining units, it is clear that the office unit was never allowed to bump into non-office jobs. Custom and practice therefore reinforce the clear language of the contract provision in prohibiting office workers from cross-bumping, and the office workers had no right to bid for non-office jobs either before or after the merger.

Although I find the District Court's analysis of the union's seniority defense to be erroneous, this finding would not affect the union's ultimate liability. The defense interposed by a bona fide seniority system would allow differences in compensation, or in terms, conditions, or privileges of employment arising from the operation of such a seniority system. The disparity here, however, is in the representation afforded female office workers by the union. No seniority plan forced the union to ignore, mislead, or segregate the female office workers. The defense, therefore, affords no relief from the substantive basis of the plaintiffs' complaint—it is a meritorious, but incomplete defense.

The seniority defense, however, is important in two other respects. First, the process of labor contract interpretation

that is required to prove or disprove the defense raises the possibility of federal preemption under § 301 of the Labor Management Relations Act. This problem is addressed in the preemption section below. The second issue is whether the plaintiffs' inability to obtain new, non-office jobs with Cassens under their contract mitigates the damages attributable to the union's discrimination. In other words, if the plaintiffs would have lost their jobs anyway, what reduction is due in the damage award assessed against the union? This question is addressed in the section on damages also presented below.

III. *The Preemption Claims*

Although I find that the union violated the Elliott-Larsen Act, the difficult issue in this case is whether a meritorious state-law discrimination action is nonetheless preempted by federal labor law.

Whenever federal regulatory legislation is enacted, numerous lawsuits urging preemption of similar state statutes and the establishment of federal common law rules can be expected. Certainly this has been true with respect to federal regulation touching the employer/employee relationship, as demonstrated by the litigative history of ERISA, NLRA, Taft-Hartley, Landrum-Griffin, and Title VII. Preemption issues touch the fundamental doctrines upon which our government is based: the separation of powers and federalism. Decisions regarding preemption are decisions interpreting the Supremacy Clause and the separation and allocation of power among the various tribunals of the state and federal governments of our federal system. The Supreme Court recently summarized the general thrust of preemption analysis:

> [T]he NLRA contains no statutory pre-emption provision. Still, as in any pre-emption analysis, " '[t]he purpose of Congress is the ultimate touchstone.' "

> Where the pre-emptive effect of federal enactments is not explicit, "courts sustain a local regulation 'unless it conflicts with federal law or would frustrate the federal scheme, or unless the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States.' "

Metropolitan Life Ins. Co. v. Commonwealth of Massachusetts, 471 U.S. 724, 747-48 (1985)(citations omitted). The Court has consistently held that in enacting the NLRA and the LMRA, Congress did not intend to completely occupy the field; the States retain some authority to enact labor-related legislation. *See Allis-Chalmers v. Lueck*, 471 U.S. 202, 208-09 (1985); *Amalgamated Ass'n of Street, Electric Ry. & Motor Coach Employees v. Lockridge*, 403 U.S. 274, 289 (1971); *Garner v. Teamsters Union*, 346 U.S. 485, 488 (1953).

The problem is that Congress has not indicated even in a general way how much state authority has been preempted. *See Allis-Chalmers*, 471 U.S. at 208; *Lockridge*, 403 U.S. at 289. Indeed, with respect to the relationship between a union and its members—the type of relationship we have in the instant case—there is some suggestion that Congress never intended to oust any state regulation. *See* Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337, 1372-73 (1972); Cox, *Recent Developments in Federal Labor Law Preemption*, 41 Ohio St. L. J. 277, 284 (1980). The judicially-developed preemption rules create standards to determine the preemption questions left unanswered by Congress.

Four major interconnecting preemption doctrines exist. Two are involved in this case.

A. *Interference with a Federally Guaranteed Right* — Brown *Preemption*

The simplest preemption doctrine provides that the States may not regulate conduct that is actually protected by federal

law. *See Brown v. Hotel and Restaurant Employees Local 54*, 468 U.S. 491, 503 (1984). This principle is applicable to every conflict between state and federal substantive law, and flows directly from the Supremacy Clause. *Id.* Courts must first determine whether a federal right exists, and then assess the impact of a state regulation upon that federal right.

This simple rule is also simple to apply in the present case. It cannot be argued that the NLRA, or any federal statute, gives a labor union the right to engage in sex discrimination. Indeed, this Circuit has held that sex discrimination by a union constitutes an unfair labor practice prohibited by § 8 of the NLRA. *NLRB v. Local 106, Glass Bottle Blowers Ass'n*, 520 F.2d 693 (6th Cir. 1975); *see also Bell & Howell Co.*, 230 N.L.R.B. 420 (1977). There can be no argument, therefore, that the Michigan statute is preempted by a conflict with a federally guaranteed substantive right.

B. *Regulation of Labor/Management Balance of Power* — Machinists *Preemption.*

A second variety of preemption operates when the State seeks to alter the economic power of labor or management. The NLRA established a balance of economic power between these competing factions. In that statute, Congress guaranteed some economic power through § 7 protection, and prohibited some techniques by listing them as unfair labor practices under § 8. However, by its silence as to other economic weapons, Congress indicated an intent to let some aspects of the labor/management relationship "be controlled by the free play of economic forces." *Machinists v. Wisconsin Employment Relations Comm'n.*, 427 U.S. 132, 140 (1976). As described in *Belknap v. Hale*, 463 U.S. 491, 499 (1983), the preemption doctrine announced in *Machinists* "proscribes state regulation and state-law causes of action concerning conduct that Congress intended to be unregulated,. . . conduct that was to remain a part of the self-help

remedies left to the combatants in labor disputes." *Belknap*, 463 U.S. at 499 (citations omitted).

The rationale of the *Machinists* case makes clear that this type of preemption applies only to state action which affects the balance of power between labor and management. But the Michigan statute at issue here affects only the union's relationship to its members. It is also obvious that Congress did not intend to allow a union to use sex discrimination against its members as a "self-help" measure. *Machinists* preemption is therefore wholly inapplicable to the present case.

C. *Interpretation of Labor Contracts — LMRA § 301 Preemption*

Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a), authorizes direct suit in the district courts for violations of a collective bargaining agreement. This statute has been interpreted as a mandate for the courts to fashion a uniform body of federal common law to resolve disputes over the interpretation and enforcement of these federal labor contracts. *See generally Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456 (1957); Field, *Sources of Law: The Scope of Federal Common Law*, 99 Harv. L. Rev. 883 (1986). This mandate means that in order to achieve the uniformity contemplated by Congress, the federal common law created through § 301 should preempt state regulation of the terms of collective bargaining agreements. *See Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103-04 (1962). Section 301 preemption applies whenever a state rule "purports to define the meaning or scope of a term" in a collective bargaining agreement. *Allis-Chalmers*, at 471 U.S. 210. Claims cognizable under state law must be brought as § 301 suits when they are "substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract." *Id.* at 220; *I.B.E.W. v. Hechler*, 107 S. Ct. 2161, 2166 n.3 (1987).

As noted by the Court in *Allis-Chalmers*, however, the preemptive scope of § 301 is not all-encompassing: Congress did

not intend to displace all state law concerning employment or collective agreements. 471 U.S. at 208; *see also Michigan Mutual Insurance Co. v. United Steelworkers,* 774 F.2d 104, 106 (6th Cir. 1985)(interpreting *Allis-Chalmers).* Therefore, "state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract" are not preempted even if they are related to the agreement in some way. *Allis-Chalmers,* 471 U.S. at 212; *Michigan Mutual,* 774 F.2d at 106. The focus is on whether the effect of the state law can be altered by agreement of the parties. If the parties to a collective bargaining agreement can "contract away" the protection of the state statute, the statute is not sufficiently independent of that agreement and it is preempted. *Allis-Chalmers,* 471 U.S. at 213.

The *Allis-Chalmers* opinion illustrates the application of § 301 preemption. At issue in that case was the effect of § 301 on a Wisconsin tort statute allowing an employee to recover against an employer for the employer's bad faith in processing an insurance claim. In order to show bad faith on the part of his employer, the plaintiff had to prove the scope of the duty owed to him. Since this duty of care was in turn defined by the collective bargaining agreement, the tort suit could not be resolved without rendering an interpretation of the federal labor contract. *Allis-Chalmers,* 471 U.S. at 216-19. This dependence on the terms of the collective bargaining agreement caused preemption of the Wisconsin statute.

In *I.B.E.W. v. Hechler,* 107 S. Ct. 2161 (1987), the *Allis-Chalmers* analysis was extended beyond the employee-employer relationship to suits between a union and its membership involving implied terms of the collective bargaining agreement. The plaintiff alleged that she was injured on the job because of inadequate training. The collective bargaining agreement contained language that placed some responsibility on the union to supervise the placement and training of its members. 107 S. Ct. at 2168 n.4. The plaintiff brought a common-law negligence action against the union

based upon the union's breach of a duty to place the plaintiff in a safe workplace. The union removed the case to federal court, and ultimately won a dismissal, on the grounds that § 301 governed the plaintiff's cause of action. The Eleventh Circuit reversed the dismissal, holding that the tort action was independent of the collective bargaining agreement.

The Supreme Court granted certiorari in *Hechler* to resolve a split that decision had created with this Circuit's decision in *Michigan Mutual Insurance Co. v. United Steelworkers*, 774 F.2d 104 (6th Cir. 1985), which held that § 301 preempted a similar claim under Michigan law. In reversing the Eleventh Circuit's decision in *Hechler*, the Supreme Court focused on the source of the duty to provide adequate training which gave rise to the state tort action. Since the *employer*, not the union, had the common-law responsibility to provide a safe workplace, the union must have assumed that duty in the collective bargaining agreement or it would not be liable at all under the plaintiff's theory of the case. Therefore, the union's duty of care was wholly contractual and flowed from the collective bargaining agreement, not state common or statutory law. *Hechler*, 107 S. Ct. at 2167-68. Because "questions of contract interpretation ... underlie any finding of tort liability" where the duty at issue flows from the collective bargaining agreement, the Court concluded that Ms. Hechler's cause of action was preempted by § 301. 107 S. Ct. at 2168 (quoting *Allis-Chalmers*, 471 U.S. at 218).

Unlike the actions at issue in *Hechler*, *Allis-Chalmers*, and in *Maynard v. Revere Copper Products, Inc.*, 773 F.2d 733 (6th Cir. 1985), cases which are clearly misinterpreted in the majority opinion, the duty at issue in the present case does not flow from the collective bargaining agreement. This distinction is crucial, because the noncontractual nature of the duty also means that it cannot be "waived or altered by agreement of [the] parties." *Allis-Chalmers*, 471 U.S. at 213. Liability under the Elliott-Larsen Act accrues for violating its

statutory prohibitions on discrimination, not for the breach of a contractual duty of care established by the collective bargaining agreement. No contract interpretation is required to ascertain the scope of a statutory duty, this being precisely the kind of non-waivable, independent duty approved by the *Allis-Chalmers* Court. *See Allis-Chalmers,* 471 U.S. at 212.

In *Maynard v. Revere Copper, supra,* relied upon heavily by the majority opinion, Judge Lively, after quoting the Michigan statute prohibiting a union from failing "to fairly and adequately represent a member in a grievance process because of a member's handicap," says that:

> Judge Guy [the district judge] concluded that this provision creates no new rights for an employee and imposed no duty on a union not already clearly present under existing federal *labor* law.

773 F.2d at 735 (emphasis added). Thus in *Maynard* the state law was held to be precisely the same as federal labor law and gave no rights different from and independent of those arising under the language of the labor management contract as interpreted under federal labor law. This is precisely the kind of problem the Supreme Court dealt with in *Allis-Chalmers v. Lueck, supra. Allis-Chalmers* is directly on point for the *Maynard* case but not in our case. *Maynard* is distinguishable from the instant case for the same reason that *Lueck* is distinguishable from our case: namely, the source of the sex discrimination rights that the plaintiff asserts are separate from and independent of rights under the collective bargaining agreement and federal labor law. In the next section, which deals with *Garmon* preemption, I will set out in more detail the reasons why the state's sex discrimination statutory tort does not overlap or impinge upon any federal labor law.

The present case is unusual, however, because the contract is interpreted to establish a *defense,* not to establish the duty upon which the action is based. I believe that this is the type

of "tangential relationship" which is insufficient to trigger federal preemption. *See Allis-Chalmers*, 471 U.S. at 211. Section 301 was not enacted to allow a defendant to escape a state anti-discrimination statute by raising a labor contract in defense. Federal law must be used to establish the defense because the labor contract is itself a creature of federal law. But the fact that the labor agreement must be considered by the trial court in assessing liability for sex discrimination will not result in conflicting interpretations of these federal contracts, and therefore does not implicate § 301 preemption.

D. *Interference With NLRB Jurisdiction* — Garmon *Preemption*

It is unclear to me whether the majority is applying *Garmon* preemption to defeat and preempt state sex discrimination law or not.

When Congress enacted the National Labor Relations Act, it enacted comprehensive procedural rules and created a new tribunal—the National Labor Relations Board—to administer this specially designed regulatory structure. The result was a "complex and interrelated scheme of federal law, remedy, and administration" designed to achieve uniformity in our national labor policy. *See San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 242-43 (1959). Entrusting interpretation and enforcement of the NLRA to a "centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience," was crucial to achieving the desired uniformity. *Id.* at 242. Otherwise, differing judicial attitudes and procedures among multiple tribunals would inevitably produce conflicting interpretations of the NLRA. *See Garner v. Teamsters Union*, 346 U.S. 485, 490-91 (1953).

The Supreme Court has fashioned a special preemption doctrine to protect the centralization of administration envisioned by Congress. In *Garmon*, the Court held that "[w]hen

an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." 359 U.S. at 245. The breadth of the language used in this standard —"arguably subject to § 7 or § 8"—is meant to protect jealously the NLRB's authority to interpret and enforce the core sections of the statute. If primary administrative authority is to mean anything, it must include giving the NLRB the initial opportunity to determine whether conduct is protected activity under § 7, or prohibited as an unfair labor practice under § 8.

The *Garmon* opinion itself, however, admits exceptions to the NLRB's primary jurisdiction. Where the conduct at issue is of only "peripheral concern" to federal labor policy, centralized decision-making is not as important, *Garmon,* 359 U.S. at 243; and the gains to be reaped from a diffusion of power in our federal system support limited state regulation of these "peripheral" matters. *Id.* In addition, respect for the regulatory role of the States also requires that their authority be maintained over activity "deeply rooted in local feeling and responsibility." *Id.* at 244. This second exception is necessary because Congress has provided no compelling indication that it intended to deprive the States of their traditional power over these matters. *Id.*

The *Garmon* rule remains the general test for preemption, but a number of recent cases have addressed limitations on the rule that go beyond the two stated in the opinion. These cases reflect the Supreme Court's reluctance to apply *Garmon* in a "literal, mechanistic fashion." *Sears, Roebuck & Co. v. Council of Carpenters,* 436 U.S. 180, 188 (1978). Of particular relevance here is the evolving distinction between conduct that is arguably "protected" and that which is arguably "prohibited" under the Act. Since there can be no argument that sex discrimination by a labor union is even arguably pro-

tected by the NLRA, we need to focus on the cases dealing with the "arguably prohibited" branch of *Garmon.*

Where a state cause of action prohibits conduct that is arguably prohibited by the NLRA, there is no danger that state regulation will interfere with conduct that Congress intended to protect. *See Farmer v. United Brotherhood of Carpenters,* 430 U.S. 290, 298, 302 (1977). In such a case, the preemption question turns on a balancing of the respective federal and state interests in regulating the conduct. *Id.* at 300; *Belknap v. Hale,* 463 U.S. 491, 498-99 (1983); *Local 926, Int'l Union of Operating Eng'rs v. Jones,* 460 U.S. 669, 676 (1983). That the state cause of action presents "some risk" to an area of "primary federal concern" is insufficient to preempt it. *Id.* at 303; *Sears, Roebuck & Co. v. Council of Carpenters,* 436 U.S. 180, 196 n.25 (1978). Thus a statute which would be preempted under a rigid application of the *Garmon* rule may nonetheless be upheld if the State's interest is sufficiently compelling. *Farmer,* 430 U.S. at 302.

Another factor to be considered in the preemption equation is the extent to which litigation in the state forum will be similar to the federal proceeding in content and remedy. This concept is best stated by the Court in *Sears, Roebuck & Co. v. Council of Carpenters.* Reasoning from the "primary jurisdiction" rationale of *Garmon* and considering the procedural difficulties of obtaining Board review in some contexts, the *Sears* Court held that a state cause of action is preempted only where the controversy presented to the state court is identical to that which could have been presented to the Board. *Sears,* 436 U.S. at 197, 202. The focus is on the character of the litigation in the two forums: *i.e.* whether the predicate issues and available remedies are the same. *See* Cox, *Recent Developments in Federal Labor Law Preemption,* 41 Ohio St. L.J. 277, 282-84 (1980). Where this identity is lacking, the state court's adjudication of the state cause of action does not threaten the federal regulatory scheme because the state tribunal does not purport to act as a surrogate labor

board. *Sears*, 436 U.S. at 197 n.26 (quoting *Farmer*, 430 U.S. at 304-05)..

The foregoing cases establish a framework for deciding the § 8 preemption question posed by the present litigation. As a starting point, there is no question that sex discrimination by a union against its members constitutes a breach of the union's duty of fair representation and is an unfair labor practice. *See N.L.R.B. v. Local 106, Glass Bottle Blowers Ass'n*, 520 F.2d 693 (6th Cir. 1975); *Bell & Howell Co.*, 230 N.L.R.B. 420 (1977). This triggers the presumption of preemption enunciated in *Garmon*, and the Michigan statute can survive preemption only if the "local interest" exception to *Garmon* is applicable.

I do not pause long on the question of whether sex discrimination is a matter of "local interest." Given the prevalence and perniciousness of gender-based discrimination in the workplace, the State of Michigan has an obvious and compelling interest in enacting prohibitory legislation. The State's interest here is at least as weighty as the interests that have justified a local interest exception in previous cases. *See Farmer*, 430 U.S. at 302 (infliction of emotional distress); *Linn v. Plant Guard Workers*, 383 U.S. 53 (1966) (libel); *Automobile Workers v. Russell*, 356 U.S. 634 (1958) (physical violence). This interest is therefore sufficient to prevent preemption here unless the Michigan statute creates undue interference with the federal regulatory scheme.

In an analogous situation, the Supreme Court has held that private suits to enforce the union's duty of fair representation do not create undue interference with the federal regulatory scheme. In *Vaca v. Sipes*, 386 U.S. 171, 182-84 (1967), the Court held that the history and special purpose of the duty of fair representation doctrine undercut the rationale for primary Board jurisdiction:

> A primary justification for the pre-emption doctrine—the need to avoid conflicting rules of sub-

stantive law in the labor relations area and the desirability of leaving the development of such rules to the administrative agency created by Congress for that purpose—is not applicable to cases involving alleged breaches of the union's duty of fair representation. The doctrine was judicially developed in *Steele* and its progeny, and suits alleging breach of the duty remained judicially cognizable long after the NLRB was given unfair labor practice jurisdiction over union activities by the L. M. R. A. Moreover, when the Board declared in *Miranda Fuel* that a union's breach of its duty of fair representation would henceforth be treated as an unfair labor practice, the Board adopted and applied the doctrine as it had been developed by the federal courts. Finally, as the dissenting Board members in *Miranda Fuel* have pointed out, fair representation duty suits often require review of the substantive positions taken and policies pursued by a union in its negotiation of a collective bargaining agreement and in its handling of the grievance machinery; as these matters are not normally within the Board's unfair labor practice jurisdiction, it can be doubted whether the Board brings substantially greater expertise to bear on these problems than do the courts, which have been engaged in this type of review since the *Steele* decision.

In addition to the above considerations, the unique interests served by the duty of fair representation doctrine have a profound effect, in our opinion, on the applicability of the pre-emption rule to this class of cases . . . . [T]he duty of fair representation has stood as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law. Were we to hold, as petitioners and the

> Government urge, that the courts are foreclosed by the NLRB's *Miranda Fuel* decision from this traditional supervisory jurisdiction, the individual employee injured by arbitrary or discriminatory union conduct could no longer be assured of impartial review of his complaint, since the Board's General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint. The existence of even a small group of cases in which the Board would be unwilling or unable to remedy a union's breach of duty would frustrate the basic purposes underlying the duty of fair representation doctrine.

Vaca, 386 U.S. at 180-83 (citations and footnotes omitted).

Furthermore, Congress has itself recognized that the primary NLRB jurisdiction must yield where a union discriminates against its members on the basis of sex. In order to vindicate the public interest in eliminating union discrimination without forcing recourse to inadequate NLRB procedures, Congress included a special provision in Title VII to cover discrimination by a union, and allowed this prohibition to be enforced by a private action. *See* 42 U.S.C. §§ 2000e-2-5 (1982). Congress obviously found the potential interference caused by private suits to be acceptable in light of the importance of eradicating discrimination. Since the Michigan Elliott-Larsen Act is patterned after Title VII, it will not pose a significantly greater threat to national labor policy than that already endorsed by Congress.

The apparent contradiction between *Garmon* preemption and the approach taken in the *Vaca* case and Title VII can be resolved by reference to the original purpose of the preemption rule: ensuring that disputes within the Board's expertise were committed first to it. But, as Professor Cox has noted, "Congress has never developed a comprehensive and impliedly exclusive plan of federal regulation for

union-member relations." Cox, *Labor Law Preemption Revisited,* 85 Harv. L. Rev. 1337, 1372 (1972). As a result, the NLRB has no special expertise over these disputes. Furthermore, the courts, not the NLRB, generally adjudicate discrimination actions. Since the NLRB has little expertise over either the parties or the subject-matter of the dispute, the primary jurisdiction rationale of *Garmon* does not apply to a discrimination suit between a union member and a union.

Moreover, whatever interference with NLRB jurisdiction is posed by the present claim, it is diminished by the marked dissimilarity between an Elliott-Larsen proceeding and an unfair labor practice charge. *See Sears,* 436 U.S. at 197. An Elliott-Larsen plaintiff controls her own lawsuit, while the unfair labor practice charge ultimately pits the NLRB, not the charging individual, against the party charged with the violation. While the *Vaca* Court described the drawbacks of NLRB representation from the plaintiff's perspective, 386 U.S. at 182-83, an unfair labor practice proceeding does allow the aggrieved party a chance at redress without hiring a private attorney. Furthermore, distinct remedies—punitive damages under the state statute or decertification of the union under the NLRA—reinforce the discrete purposes of the two statutes. Stated in terms used by the *Sears* Court, an Elliott-Larsen action does not present a controversy "identical to . . . that which could have been, but was not, presented to the Labor Board." 436 U.S. at 197.

I conclude, therefore, that the state statute is not preempted by the National Labor Relations Act. When measured against the weighty interest the State of Michigan has in eliminating discrimination, the potential interference with national labor policy created by the Elliott-Larsen Act is insufficient to force preemption of the statute. Both the Supreme Court in *Vaca v. Sipes,* and Congress in Title VII, have indicated the limits of the NLRA as an anti-discrimination statute. The State of Michigan has enacted a law that recognizes these limitations and prescribes an alternative remedy consistent with that

provided by Congress in Title VII. Under these circumstances, there is no reason to believe that Congress enacted the NLRA to prevent such a salutary development in the laws of the States.

IV. Damages

When the District Court reheard this case after our remand order, it did not recompute the damages allocable to the union but merely reinstated the judgment entered in the earlier proceeding. Although the plaintiffs had settled with the codefendant employer in the interceding period, the District Court saw no need to recompute the damages when an appeal was pending on liability. Thus the earlier judgment was reaffirmed despite the plaintiffs' concession that the union was entitled to a setoff to reflect the Cassens settlement. *See* Record on Motion to Affirm or Reinstate Judgment at 21.

The record on the motion to reinstate the judgment reflects genuine confusion as to the application of a setoff in favor of the union, the availability of prejudgment interest, and the appropriate interest rate for interest awards. As a result, I agree that we must vacate the present damage award and remand for detailed findings of fact and conclusions of law on the intricate damages issues presented by this case. On remand, the District Court should be instructed to recompute the damages based on the principles established by the Elliott-Larsen Act for that purpose.[3]

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[3]Since the Elliott-Larsen Act was modeled on Title VII, aspects of the federal action have been incorporated into the state statute. However, Michigan has interpreted the damages provision of the Elliott-Larsen Act to support an award of exemplary damages, a result not possible under Title VII. *See Ledsinger v. Burmeister*, 318 N.W.2d 558, 563 (Mich. App. 1982). Thus, cases which address problems of contribution and indemnity under Title VII may not be helpful because of Michigan's apparent divergence from federal law on damages questions. *See, e.g., Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77 (1981); *Anderson v. Local Union 3, I.B.E.W.*, 751 F.2d 546 (2d Cir. 1984).

I agree that when recomputing the damages allocable to the union's misconduct, the District Judge should not allow damages for lost wages which resulted from the plaintiffs' inability to use their office seniority to gain non-office jobs. The limitation on cross-bumping for office employees was established by the contract, not union misconduct. I agree that if the plaintiffs would have lost their jobs even if the union had been diligent in its representation of them, the plaintiffs' recovery should be limited to compensation for the union's neglect. In other words, the union cannot be held liable for consequences it could not have prevented given the limitations imposed by the contract. I can see no reason, however, for refusing to allow the plaintiff any damages they suffered as a result of the union's use of segregated seniority lists to prevent the women from competing with men for existing or new positions for which they should have an equal opportunity to apply. Neither can I see any reason to disallow damages for the union's repeated refusal to negotiate for plaintiffs' jobs or for making misleading statements about the effects of the merger. Although the seniority provisions of the contract did not allow the office workers the right to cross-bump, the women were entitled to equal employment opportunity and equal union representation in all other respects.

APPENDIX C

No. 85-1863/86-1104

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FILED APR 29 1988 JOHN P. HEHMAN, Clerk

FRANCES JONES, ET AL.,
Plaintiffs-Appellees,

v.

CASSENS TRANSPORT,
Defendant

TRUCK DRIVERS LOCAL UNION NO. 299 a/f, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Defendants-Appellants

ORDER BEFORE: MERRITT, WELLFORD, and MILBURN, Circuit Judges

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully

considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/

John P. Hehman, Clerk

APPENDIX D

No. 85-1863/86-1104

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FILED JUL—1 1988 LEONARD GREEN, Clerk

FRANCES JONES, BEVERLY HARDER, ELEANOR MURRAY, LINDA NICKEL, and MARY RUANE,
Plaintiffs-Appellees,

v.

TRUCK DRIVERS LOCAL UNION NO. 299,
Defendant-Appellant

ORDER

BEFORE: MERRITT, WELLFORD, and MILBURN, Circuit Judges

Plaintiffs-appellees moved the court on May 16, 1988, to stay proceedings pending the decision of the United States Supreme Court in *Lingle v. Norge Division of Magic Chef, Inc., cert. granted* 108 S.Ct. 226 (1987), from the decision reported at 823 F.2d 1031 (7th Cir. 1987). We are aware that *Lingle* has now been decided on June 6, 1988, 56 U.S.L.W. 4512 (U.S. 1988), and that the decision bears upon issues heretofore decided by this court on February 3, 1988.

We direct the parties by July 18, 1988 to submit briefs on the authority of this court under the circumstances to recon-

sider our decision and to set out their respective positions in this case in light of /Lingle.

ENTERED BY ORDER OF THE COURT

/s/

APPENDIX E

No. 85-1863/86-1104

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FILED MAR 21 1989 LEONARD GREEN, Clerk

FRANCES JONES, BEVERLY HARDER, ELEANOR MURRAY, LINDA NICKEL, and MARY RUANE,
Plaintiffs-Appellees,

v.

TRUCK DRIVERS LOCAL UNION NO. 299,
Defendant-Appellant.

O R D E R

BEFORE: **MERRITT, WELLFORD, and MILBURN,** Circuit Judges

We decided this case on February 3, 1988 and remanded the case for a redetermination of liability and damages, if any (Judge Merritt dissenting in part). Appellant's petition for rehearing *en banc* was denied. Appellant then moved for a stay pending the decision of the Supreme Court in *Lingle v. Norge Div. of Magic Chef*, _____ U.S. _____, 108 S. Ct. (1988). We now deny the petition to rehear the case. We deny the motion to reconsider further in light of *Lingle*, after our examination of the briefs of the parties as to its effect.

Judge Merritt agrees that such motion comes too late,

although he adheres to his dissent and would set the case for reargument in light of the *Lingle* case.

Having denied rehearing and having given adequate reconsideration to the issues as indicate, we ORDER the **REMAND** to the district court in accordance with our February 3, 1988, opinion.

ENTERED BY ORDER OF THE COURT

/s/

Clerk

APPENDIX F

No. 85-1863/86-1104

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FILED APR 17 1989 LEONARD GREEN, Clerk

FRANCES JONES, BEVERLY HARDER, ELEANOR MURRAY, LINDA NICKEL, and MARY RUANE,
Plaintiffs-Appellees,

v.

TRUCK DRIVERS LOCAL UNION NO. 299,
Defendant-Appellant.

ORDER

BEFORE: MERRITT, WELLFORD, and MILBURN, Circuit Judges

We decided this case on February 3, 1988, and remanded the case for a redetermination of liability and damages, if any (Merritt, J., dissenting in part). Plaintiffs-appellees filed a timely petition for rehearing with suggestion for rehearing en banc. Defendant-appellant filed a timely petition for rehearing by the panel asking the panel to reverse the district court's decision rather than remand the case. The Clerk entered an order on April 29, 1988, denying the petition for rehearing without specifying if one or both petitions were denied. This apparently caused defendant-appellant to believe that their petition for rehearing only, however, was still pending; because the panel believ-

ed that it had disposed of the petition, it has taken no further action on it. On May 16, 1988, plaintiffs-appellees filed a motion for stay of proceedings pending the decision in *Lingle v. Norge Div. of Magic Chef*, 108 S. Ct. 1877 (1988). Without expressly ruling on the motion for a stay, once *Lingle* was decided, the panel ordered the parties to submit briefs discussing the court's ability to consider *Lingle* and whether *Lingle* required a different result. In their response, defendant-appellant stated their belief that their petition for rehearing was still pending.

We deny plaintiff-appellees' motion to reconsider further in light of *Lingle*, after our examination of the parties' briefs regarding the panel's authority to reconsider and *Lingle's* impact on the present case.

Judge Merritt agrees that plaintiffs-appellees' motion comes too late, although he adheres to his dissent and, if such motion had been timely, would set the case for reargument in light of the *Lingle* case.

In light of the ambiguities of our April 29, 1988 order, we explicitly deny defendant-appellant's motion for reconsideration of our remand order. We also deny defendant-appellant's request, in their motion to clarify, for an extension of time.

Having denied rehearing (and all other pending motions) and having given adequate reconsideration to the issues as indicated, we ORDER the remand to the district court in accordance with our February 3, 1988, opinion.

ENTERED BY ORDER OF THE COURT

/s/

_____

Clerk

No. 89-290 (3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

FRANCES JONES, BEVERLY HARDER, ELEANOR MURRAY, LINDA NICKEL, and MARY RUANE,

Petitioners,

v.

TRUCK DRIVERS LOCAL UNION NO. 299,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

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23 pp

QUESTIONS PRESENTED

A. Whether the court of appeals' denial of reconsideration further in light of *Lingle v. Norge Division of Magic Chef, Inc.* presents a question warranting review?

B. Whether the court of appeals decided an issue warranting review when it held that a contractually mandated seniority system was bona fide under the Michigan Elliott Larsen Act, M.C.L.A. § 37.2211?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-290

FRANCES JONES, BEVERLY HARDER,
ELEANOR MURRAY, LINDA NICKEL, and
MARY RUANE,

Petitioners,

v.

TRUCK DRIVERS LOCAL UNION NO. 299,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioners are former office clerical employees of Square Deal Cartage Company in Detroit which, prior to its sale to Cassens Transport, Inc. in August of 1977, engaged in the transportation of automobiles to local dealerships (App. p. 49a).[1]

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[1] References to "App. p." are to the appendix to the Petition for Writ of Certiorari in this matter.

Employees at Square Deal were represented by respondent Truck Drivers Local 299 in three seniority units: a combined drivers and yard unit, a garage unit and an office unit (App. p. 50a). At the time of the merger, Cassens had drivers and yard workers also represented by the respondent, but had no garage workers and its office workers were unrepresented and located at the company headquarters in Illinois (App. p. 50a).

Petitioners' employment at Square Deal was covered by the National Master Auto Transporters Agreement and Michigan Officers Supplement.[2] Under the agreement and supplement, office workers constituted a separate seniority unit. A senior laid off office employee could exercise seniority rights to gain employment at a different office but could not "cross bump" workers in the other non-office seniority units. (App. p. 59a). In the event of merger, the agreement provided a procedure for combination of seniority lists for like units, which maintained the separate unit system (App. p. 60a).[3] As a result, at the time of merger, the driver and yard units which existed at the two companies were merged. But, since there was no office unit at Cassens, petitioners were left jobless when their jobs were eliminated (App. p. 50a). Petitioners' efforts and those of their union to persuade Cassens management to retain them in some capacity were unsuccessful (App. p. 52a).

Petitioners initially brought this action against Cassens Transport and Respondent Teamsters Local 299, in the Circuit Court of Wayne County, Michigan. Petitioners' complaint alleges that they sought "bidding

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[2] The National Master Auto Transporters Agreement shall hereinafter be referred to as the "NMATA."

[3] Petitioners do not contest the court of appeals' construction of labor agreement as establishing a separate seniority unit system.

rights" at Cassens "in accordance with the seniority they had as employees of Square Deal" and that Local 299 failed to represent their interests in obtaining rights to yard jobs in negotiations or through the grievance procedure (App. p. 51a). This, petitioners maintained, was violative of state and federal law and denied petitioners equal opportunity in employment (App. p. 51a).

Respondent removed the action to the United States District Court for the Eastern District Court, asserting federal question jurisdiction under Section 301 of the Labor Management Relations Act. 29 U.S.C. § 185. After the district court's initial decision herein, petitioners settled their claims against Cassens Transport. On appeal, the Sixth Circuit Court of Appeals dismissed petitioners' federal claims against the union and remanded the pendent state claims. *Jones v. Truck Drivers Local 229*, 748 F.2d 1983 (6th Cir. 1984).

Following remand, the district court issued a second decision on September 17, 1985. Following the rationale of petitioners' pleadings, the district court construed the applicable labor agreements as providing cross bumping rights to petitioners (App. pp. 8a-14a). On the basis of its erroneous contract construction, the district court concluded that the union breached its duty of fair representation by failing to obtain cross bumping rights for petitioners (App. pp. 28a-31a). Such a breach of the duty of fair representation the court concluded violated Title VII and in turn the Elliott Larsen Act, M.C.L.A. § 37.2204(a), (App. p. 31a).

By decision issued February 3, 1988, the court of appeals for the Sixth Circuit reversed the district court's construction of the collective bargaining agreement, holding that the National Master Auto Transport Agreement and its supplements provided for separate bargaining unit seniority system which was protected by Michigan

law, M.C.L.A. § 37.2211. That system required that the union deal with petitioners in a separate unit with no right to transfer (App. pp. 59a-61a). The court of appeals held that a claim of sex discrimination against a union for failure to represent is governed by federal law. Additionally, because interpretation of the contract was necessary to determine the seniority and bargaining unit rights which petitioners sought, their claims were preempted by federal law (App. p. 57a).

Following issuance of the court of appeals' decision, petitioners filed a petition for rehearing en banc which was denied by the original panel on April 29, 1988. Two weeks later, on May 16, 1988, petitioners for the first time moved the court to stay proceedings pending the decision of the United States Supreme Court in *Lingle v. Norge Division of Magic Chef, Inc.*, cert. granted 108 S.Ct. 226 (1987).

After the Supreme Court issued its decision in *Lingle v. Norge Division of Magic Chef, Inc.*, —— U.S. —— 108 S.Ct. 1877 (1988), the Sixth Circuit requested the parties submit additional briefs concerning the application of *Lingle* to the present case (App. pp. 92a-93a). Thereafter, on March 21, 1989, the court denied the motion to reconsider further in light of *Lingle* (App. pp. 94a-95a). Because of a misreference in the earlier order to appellants rather than appellees, an additional order was issued by the court on April 17, 1989, which denied reconsideration "after our examination of the parties' briefs regarding the panel's authority to consider and *Lingle's* impact on the present case" (App. p. 97a).[4]

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[4] Petitioners fail to acknowledge that the court's denial of reconsideration in light of *Lingle* was premised both on its analysis of *Lingle's* impact on the present case as well as its lack of authority to entertain petitioners' motion.

SUMMARY OF ARGUMENT

The petition herein seeks review of a court of appeals' decision that petitioners' state law claim is preempted because it is dependent upon interpretation of a collective bargaining agreement. That decision follows the holding of several decisions issuing from this Court. The question therefore does not present an issue warranting review.

Additionally, petitioners seek review of the court of appeals' application of the Michigan Elliott Larsen Act to the facts of the present case. The application of state law turning on the analysis of fact is not appropriately reviewed by this Court. Moreover, the decision of the court below is entirely correct.

The petition for writ of certiorari should therefore be denied.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS' DENIAL OF RECONSIDERATION FURTHER IN LIGHT OF *LINGLE v. NORGE DIVISION OF MAGIC CHEF, INC.* IS CORRECT AND DOES NOT WARRANT REVIEW.

A. Neither The Decision Nor The Record Below Raises The Question Presented In The Petition.

In raising the application of *Lingle v. Norge Division of Magic Chef*, petitioners fail to disclose that their claims against the union are premised directly on alleged seniority and bidding rights which are dependent on an interpretation of the applicable labor agreement.

Petitioners' complaint herein seeks seniority and bidding rights which, petitioners maintain, should have been provided to them through a negotiated labor agreement.

COUNT I:

> 11. Defendants, jointly and severally, *negotiated an agreement* to allow employees of Square Deal Cartage Company *to bid* on jobs at Cassens Transport *in accordance with the seniority* they had as employees of Square Deal Transport. That *said agreement* excluded Plaintiffs from such *bidding rights.* (emphasis added).

With elimination of their office jobs at Square Deal, petitioners sought jobs as "yard workers" at Cassens "in accordance with their seniority." [5] Thus, petitioners sought cross bumping rights from the office unit to the yard unit.[6]

It has long been recognized that seniority and bidding rights, such as petitioners claim herein, exist only to the extent they are established by a collective bargaining agreement, *Charlton v. Norge Division, Borg Warner Corp.*, 407 F.2d 1062 (6th Cir. 1969), cert. denied, 369 U.S. 871, citing *Ford Motor Company v. Huffman*, 345 U.S. 330 (1953). The seniority rights which form the basis of petitioners' claim, then, are completely dependent on contract construction.

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[5] The Complaint states:

> 7. On August 26, 1977, Plaintiffs were informed that their particular jobs at Square Deal Cartage Co. were being eliminated.
>
> 8. On or About August 30, 1987, Plaintiffs requested employment with Defendant Company, in accordance with their seniority, as "yard" workers. Defendant Company refused said request solely because Plaintiffs were women.

[6] As the court of appeals explains, cross bumping rights were not provided by the NMATA during mergers or at any other time.

> The contract does not envision that the event of a merger will allow office employees to do what they could not otherwise: cross-bump less senior employees from different bargaining units.

(App. p. 60a).

Here, the court of appeals found that petitioners' claims were dependent on interpretation of the labor agreement and were therefore preempted.

> Interpretation of the contract was necessary to determine seniority and bargaining rights in this case. Interpretation of the contract was also inextricably intertwined in the union's delicate problem of representing different bargaining units in the merger of the operations after Cassens' acquisition and merger. Interpretation and enforcement of the collective bargaining agreement is essentially and primarily a matter of federal labor law.

(App. p 57a).[7]

The issue raised in this case, then, is whether a state claim which is dependent upon interpretation of a labor agreement is preempted. As set forth below, the conclusion that contractually dependent claims are preempted is required by *Allis-Chalmers v. Lueck*, 471 U.S. 202 (1985) and is entirely consistent with *Lingle v. Norge Division of Magic Chef, Inc.*, —— U.S. —— 108 S.Ct. 1877 (1988). This case therefore fails to present "an important question of federal law which has not been settled by this court" under Sup. Ct. R. 17.1(c).[8]

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[7] While the Sixth Circuit decision herein makes reference to an express non-discrimination section in the parties' labor agreement, the court's conclusion concerning preemption is not dependent on that setcion of the agreement. After mentioning the discrimination clause, the court goes on to explain that it was the necessary interpretation of the collective bargaining agreement which required preemption (App. p. 57a).

[8] Sup. Ct. R. 17 provides:

> 1. A review on writ on certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's dis-

B. The Court Of Appeals Herein Correctly Held That *Norge Division Of Magic Chef, Inc.*, —— U.S. —— 108 S.Ct. 1877 (1988) Did Not Impact On Its Decision Herein.

The court of appeals held that because petitioners' claims to cross over seniority rights at Cassens required construction of the NMATA and supplements, they were preempted. This conclusion follows directly from the legal principles articulated in *Electrical Workers v. Hechler*, —— U.S. —— 107 S.Ct. 2161 (1987) and *Allis-Chalmers v. Lueck*, 471 U.S. 202 (1985). It is not altered, but rather confirmed by *Lingle v. Norge Division of Magic Chef, Inc.*, —— U.S. —— 108 S.Ct. 1877 (1988).

In *Lingle v. Norge Division of Magic Chef, supra*, the Supreme Court held that a state law claim which is established without reference to a collective bargaining agreement is not preempted by federal law under § 301 of Labor Management Relations Act. In reaching its conclusion, the court reaffirmed its holding in *Allis-Chalmers Corp. v. Lueck, supra*, that state claims which are dependent on construction of a collective bargaining agreement are necessarily preempted.

> *Lueck* faithfully applied the principle of Section 301 preemption developed in *Lucas Flour*: if the resolution of a state claim depended upon the meaning of a collective bargaining agreement, the application of state law (which might lead to inconsistent results such since there could be as many state law principles as there are states) is preempted on federal

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cretion, indicate the character of reasoning that will be considered....

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

> labor law principles—necessarily uniform throughout the nation—must be employed to resolve the dispute.

108 S.C.t at 1881. Thus, the Court concluded "judges can determine questions of state law involving labor management relations *only* if such questions do not require construing the collective bargaining agreements." (emphasis added) 108 S.Ct. at 1884.

Here, the primary claim petitioners raise against the union is that they should have obtained cross bumping rights "in accordance with seniority." Those rights are established by a national labor agreement, the NMATA, and its supplements. Uniformity of contract interpretation requires absolute preemption of such claims. As this Court explained in *Teamsters v. Lucas Flour*, 369 U.S. 95 (1962),

> More important, the subject matter of § 301(a) . . . 'is peculiarly one that calls for uniform law.' . . . The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements.

369 U.S. at 103. If the Michigan Elliott Larsen Act could be utilized to alter employees' bidding and seniority rights under the NMATA, negotiation and administration of such national agreements would be impossible.

Here, preemption is mandated not only because petitioners' state law claim is dependent on interpretation of a labor agreement, but additionally because petitioners' claims are essentially federal claims for breach of the duty of fair representation.

> We believe that *Maynard v. Revere Copper Products, Inc.*, 773 F.2d 733 (6th Cir. 1985), is controlling here. The plaintiffs' action under state law is essentially the same as their claims under federal law against the union. . . . There were no new rights

> created under the Michigan law nor any new duty imposed upon the union not already present under existing federal law. As in *Maynard*, essentially the same claim for failure to represent was previously found to be time barred under federal law which applied. This kind of claim, a failure to represent *fairly*, is essentially a matter of federal law, 'an area of labor law which has been so fully occupied by Congress' as to foreclose or to preempt state regulation. *Id.* at 735.

(App. pp. 57a-58a).

It is the respondent's view that the only claims raised by petitioners against the union are those arising from their claim to cross bump from the Square Deal office to Cassens' yard work which, of necessity, require interpretation of the applicable labor agreement. If, *arguendo*, petitioners have alleged claims which are independent of the labor agreement, the court of appeals' decision has preserved such claims by remanding this action to the district court for determination of liability and "damages, if any" attributable to the union's alleged misconduct but not resulting from "implementation of the merger under the terms of the existing collective bargaining agreement" (App. p. 62a). Thus the court of appeals' decision, if anything, anticipates the precise distinction articulated in *Lingle*. "Judges can determine questions of state law involving labor management relations only if such questions do not require constrained collective bargaining agreements." 108 S.Ct. at 1884.

The preemption of petitioners' state law claims to cross over seniority is not altered by petitioners' articulation of those claims under a state anti-discrimination law which is coordinated with Title VII of the Civil Rights Act of 1964. As this Court found in *Lingle*, the distinction between state anti-discrimination claims and others is "unnecessary for determining whether § 301 preempts." 108 S.Ct. at 1885. The critical question is whether or not the

claim is dependent on interpretation of a labor agreement. Since petitioners' claim for cross-over seniority rights is based on interpretation of the seniority and merger provisions of the NMATA and supplement, it is therefore preempted.[9]

The task of determining whether preemption is compelled is the same whether applied to state anti-discrimination laws or any other state causes of action: "to ascertain Congress' intent" in enacting the federal statute. *Shaw v. Delta Air Lines*, 463 U.S. 85, 95 (1983).[10] As the court explained in *Allis-Chalmers*, Congressional intent in enacting § 301 was to preempt interpretation of labor agreements absolutely. "In this situation, the balancing of state and federal interests required by *Garmon* preemption are irrelevant, since Congress, acting within its power under the Commerce Clause has provided the federal law must prevail." 85 L.Ed.2d at 217, footnote 9. Thus, state claims which require interpretation of a labor agreement are preempted without regard to the nature of the state law involved.[11]

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[9] The vast majority of state discrimination claims of employees covered by labor agreements will likely not require interpretation of labor agreements. It is only in the rare case, as here, that the claim of the employee is based on a right or duty which is established exclusively by contract that the claim is preempted. *Electrical Workers v. Hechler, supra.*

[10] It follows that state discrimination laws are preempted by federal law in accordance with the same standards generally applicable to the statutory scheme involved. *Maynard v. Revere, supra, Waukesha Engine Division v. Dept. of Ind.*, 619 F. Supp. 1310 (W.D. Wis. 1985), *BLE v. Industrial Comm.*, 604 F. Supp. 1417 (D. Utah, 1985).

[11] For example, in *Jackson v. Liquid Carbonic Corp.*, 863 F.2d 111 cert. den. 6/12/89, 57 U.S.L.W. 3812, the First Circuit found a claim for violation of the right to privacy under Mass. Civil Rights Act was preempted because the claim required interpretation of a collective bargaining agreement to establish the employees bona fide expectations of privacy. See also *Laws v. Calmat*, 852 F.2d 430 (9th Cir. 1988).

Petitioners' reliance on *Caterpillar v. Williams*, —— U.S. ——, 107 S.Ct 2425 (1987) is similarly misplaced. Initially, it must be noted that the language of petitioners' complaint establishes that their claim is for rights "in accordance with seniority" established by a collective bargaining agreement. After ten years and three appeals, it is too late for petitioners to assert their claims are not premised on a labor agreement. *Electrical Workers v. Hechler*, *supra*, 107 S.Ct. at 2168, footnote 5.

Moreover, even if, *arguendo*, the issue of interpretation arose only in defense, as petitioners now suggest, the principles of preemtpion would apply with equal force. In *Caterpillar v. Williams*, this Court held that a federal issue raised only in defense did not support *removal.*[12] The court specifically observed "we intimate no view on the merits of this or any of the preemption arguments discussed above." *Id.* at 2433, footnote 13. The Court noted that while the assertion of a federal issue in defense did not provide the basis for removal, it might well require a holding of § 301 preemption by the state court.

It is by now axiomatic that state law claims which require interpretation of a labor agreement are preempted. *Douglas v. American Information Technologies, Corp.*, 877 F.2d 565 (7th Cir. 1989); *Delapp v. Continental Can*, 868 F.2d 1073 (9th Cir. 1989); *Jackson v. Liquid Carbonic Corp., supra; Hanks v. General Motors*, 859 F.2d 67 (8th Cir. 1988); *Newberry v. Pacific Racing Association*, 854 F.2d 1142 (9th Cir. 1988); *Laws v. Calmat, supra; Knafel v. Pepsi-Cola Bottlers of Akron, Inc.*, 850 F.2d 1155 (6th Cir. 1988).

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[12] Additionally, in *Caterpillar* the agreement under which plaintiffs' claims arose was not a collective bargaining agreement under § 301 but an individual employment contract between individual employees and the employer. Here the "agreement" referred to in the complaint is between the employer and union and is covered by § 301. Complaint ¶ 11, supra.

This case is but one more case in which state claims which depend on a labor agreement are preempted under the holding of *Electrical Workers v. Hechler, supra,* and *Allis-Chalmers v. Lueck, supra.* The court of appeals' decision is not altered but only confirmed by this court's decision in *Lingle v. Norge Division of Magic Chef, supra.* There is, therefore, no basis for review.

C. Petitioners Failed To Timely Raise The Application Of *Lingle v. Norge Division Of Magic Chef, Inc.*, —— U.S. —— 108 S.Ct. 1877 (1988) In The Proceeding Before The Court Of Appeals.

Additionally, petitioners herein failed to timely preserve the question which is central to their petition for certiorari, the application of *Lingle v. Norge Division of Magic Chef, Inc.*, —— U.S. ——108 S.Ct. 1877 (1988).

The court of appeals issued its decision herein on February 3, 1988. At the time *Lingle v. Norge Division of Magic Chef, Inc.*, 823 F.2d 1031 (7th Cir. 1987) had been pending before this Court for more than three months, certiorari having been granted on October 13, 1987. 108 S.Ct. 226. Petitioner filed a timely petition for rehearing seeking reversal of the court's decision that plaintiffs' claims were preempted, but did not request a stay pending the anticipated decision in *Lingle.* On April 29, 1988, this court issued its decision denying plaintiffs' petition for rehearing en banc.

On May 12, 1988, plaintiffs filed a motion which, for the first time, requested stay of proceedings pending the decision of *Lingle* which had been pending before this Court since well before the court of appeals issued its decision or its denial of rehearing herein.

Fed. R. of App. P. 40 requires the petitions for rehearing be filed within 14 days of entry of judgment.[13]

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[13] Rule 40.(a) provides, "A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule."

Having declined to request a stay when certiorari was granted or even in the petition for rehearing, petitioners' motion raised for the first time after the denial of their petition for rehearing was untimely.

If parties were permitted to raise additional issues after petition for rehearing had been denied, there would be no practical end to appellant consideration. New court decisions having some peripheral or arguable relevance could provide a basis for dilatory request for reconsideration. "F.R.A.P. 40 was not promulgated as a crutch for dilatory counsel." *United States v. Doe*, 455 F.2d 753,, 762 (1st Cir. 1972), vacated on other grounds sub nom. *Gravel v. United States*, 408 U.S. 606 (1972); *United States v. Williams*, 499 F.2d 52, 56 (1st Cir. 1974).

The court of appeals' decision to deny reconsideration in light of *Lingle* is correct, both because the decision has no impact on the present case and was not timely raised. There is no special or important reason warranting its review.

II. THE COURT OF APPEALS' DECISION THAT THE CONTRACTUALLY MANDATED SEPARATE UNIT SENIORITY SYSTEM WAS BONA FIDE UNDER THE MICHIGAN ELLIOT LARSEN ACT M.C.L.A. § 37.2211 IS CORRECT AND DOES NOT WARRANT REVIEW.

A. The Question Raised By The Petition Does Not Warrant Review.

Petitioners ask this Court to interpret a Michigan state law in light of their allegations that the evidence here does not meet a four-part test for a bona fide seniority system under federal law. In so doing, petitioners ask the court to resolve conflicting interpretations of the evidence in their favor. This is not an appropriate basis for review by this Court. *National Labor Relations Board v. Pittsburgh Steamship Company*, 340 U.S. 498, 503 (1951). Additionally, the petition seeks review of a ques-

tion of state law. Sup. Ct. R. 17 makes no reference to such review.[14] There is simply no valid basis for the review sought by the petition.

The fact petitioners seek review of the seniority system itself underscores the premise of petitioners' claim: that the contractual seniority system be reconstructed to permit their cross bumping between bargaining units. Such a claim is preempted by federal law. Alternatively, it is foreclosed by the court of appeals' construction of the existing labor agreement. That construction cannot be indirectly reversed at this juncture by rearguing the application of state law to the particular facts of this case.

B. The Court Of Appeals' Decision Is Correct.

The court of appeals correctly held that the Michigan Elliott Larsen Act, M.C.L.A. § 37.2211 protected the separate seniority system established by the NMATA as applied to the Square Deal-Cassens merger.

Petitioners assert that the seniority system in effect at Square Deal permitted cross bumping between positions held by men and otherwise favored men over women. These are issues of fact and are therefore not the basis of review by this Court. Additionally, the decision of the court of appeals carefully addressed the very issues petitioners raise. The court specifically found that there was no evidence of cross bumping between the office and other bargaining units, rather, the prohibition of cross bumping was maintained consistent with the labor agreement.

> [I]t is clear that the office unit was never allowed to cross bump into non-office jobs. Custom and practice therefore reinforced the clear language of the contract provision in prohibiting office workers from

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[14] Notably, the language of Rule 17 deletes the references in its predecessor, Rule 19, to review when a federal court of appeals "has decided an important state or territorial qusetion in a way in conflict with applicable or state or territorial law." Sup. Ct. R. 19 (1970).

> cross bumping, and the office workers had no right to bid for non-office jobs either before or after the merger.

(App. p. 60a).

Once it is recognized that the office bargaining unit maintained separate seniority, there is no basis for the claims that the seniority system fails to meet the *James v. Stockham Valve & Fitting Co.*, 559 F.2d 310 (5th Cir. 1977) cert. den. 434 U.S. 1034 (1978) standard. The system did operate to discourage all employees equally from transferring between units. The office workers did constitute a separate bargining unit (App. p. 59a). There is no holding below nor evidence that the system had its genesis or was maintained for an illegal purpose.[15]

In fact, the separate unit seniority system at issue is established by the NMATA and its supplements which, together with its sister agreement, the National Master Freight Agreement, have been repeatedly recognized as bona fide. *Teamsters v. United States*, 431 U.S. 324 (1978); *Salinas v. Roadway Express, Inc.*, 735 F.2d 1574 (5th Cir. 1984); *Freeman v. Motor Convoy*, 700 F.2d 1339 (11th Cir. 1983); *Wiggins v. Spector Motor Freight System*, 583 F.2d 882 (6th Cir. 1978); *United States v. East Texas Motor Freight*, 564 F.2d 179 (5th Cir. 1977). See also *Salinas v. Roadway Express, Inc.*, 802 F.2d 787, 789 (5th Cir. 1986).

Petitioners' argument reduces to the claim that women who worked in the office were not as well compensated as drivers and yard workers. However, such differentials resulting from a separate seniority unit system are protected from challenge under the Michigan Elliott Larsen Act by M.C.L.A. § 37.2211, just as such differentials are

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[15] As the court of appeals noted, "there is nothing in the record that plaintiffs' opposed adoption of the collective bargaining agreement when consumated by the employer and the union. No grievance was filed by plaintiffs prior to effectuation of the merger." (App. p. 58a).

protected by § 703(h) of Title VII of the Civil Rights Act of 1964. 42 U.S.C. 2000(e)-2(h).[16] As the court of appeals noted here, "the defense interposed by a bona fide seniority system would allow differences in compensation or terms, conditions or privileges of employment arising from the operation of seniority system." (App. p. 60a-61a). This holding is consistent with principles established by this court concerning parallel protection of seniority systems provided under § 703(h) Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e)-2(h). *Teamsters v. United States*, 431 U.S. 324 (1977); *American Tobacco v. Patterson*, 456 U.S. 63 (1982); *Pullman-Standard v. Swint*, 456 U.S. 273 (1982).

The court of appeals' holding that separate unit seniority system mandated by the NMATA was protected by M.C.L.A. § 37.2211 is correct and does not raise any issue warranting review.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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[16] M.C.L.A. § 37.2211 provides, "Notwithstanding any other provision of this article, it shall not be an unlawful employment practice for an employer to apply different standards of compensation where different terms, conditions or privileges of employment pursuant to a bona fide seniority or merit system."